

FEDERAL BUREAU OF INVESTIGATION
FOI/PA
DELETED PAGE INFORMATION SHEET
FOI/PA# 1349828-0

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**FEDERAL BUREAU OF INVESTIGATION
COMMUNICATIONS SECTION**

FD-448 (10-28-71)

FEB 11 1976

TELETYPE

Transmit attached by Facsimile - PLAINTEXT

Assoc. Dir.	_____
Dep.-A.D.-Adm.	_____
Dep.-A.D.-Inv.	_____
Asst. Dir.:	
Admin.	_____
Compr. Syst.	_____
Ext. Affairs	_____
Files & Com.	_____
Gen. Inv.	_____
Ident.	_____
Inspection	_____
URGENT	_____
Laboratory	_____
Plan. & Eval.	_____
Spec. Inv.	_____
Training	_____
Legal Coun.	_____
Telephone Rm.	_____
Director Sec'y	_____

To: DIRECTOR, FBI
ATTN: DEPT. COUNSEL DIV.
From: ASSISTANT DIRECTOR MINTZ
SAC, SAN DIEGO
Subject: JUDITH CAMPBELL, ERNER VS. CLARENCE
M. KELLEY AND EDWARD H. LEVI
CIVIL SUIT NO. 75-0089

Date: 2/11/76

Time: Transmitted

- ☐ Fingerprint Photo
- ☐ Fingerprint Record
- ☐ Map
- ☐ Newspaper clipping
- ☐ Photograph
- ☐ Artists Conception
- ☒ Other Complaint
- ☐ (6 min)
- ☐ (4 min)

Special handling instructions:

101-13

REC-78

62-116929

FEB 21 1976
116929

10 ENCLOSURE

Handwritten signature/initials

Handwritten signature/initials

FILED

FEB 6 - 1976

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY *[Signature]* DEPUTY

1 BRIAN D. MONAGHAN, ESQ.
2 1324 Security Pacific Plaza
3 1200 Third Avenue
4 San Diego, California 92101
5 (714) 232-6254

6 Attorney for Plaintiff

7
8 UNITED STATES DISTRICT COURT
9 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

10
11 JUDITH KATHERINE EXNER,
12 Plaintiff,

13 vs.

14 FEDERAL BUREAU OF INVES-
15 TIGATION,

CIVIL ACTION NO. 76-89-5

62-116929

16 CLARENCE M. KELLEY, Director,
17 Federal Bureau of Investi-
18 gation
19 10th Street and Pennsylvania
20 Avenue, N.W.
21 Washington, D.C. 20535
22 UNITED STATES DEPARTMENT OF
23 JUSTICE, and
24 EDWARD H. LEVI, Attorney
25 General of the United States
26 Department of Justice Building
27 10th Street and Pennsylvania
28 Avenue, N.W.
29 Washington, D.C. 20530.
30 Defendants.

31 COMPLAINT FOR INJUNCTIVE RELIEF

32 1. This is an action under the Freedom of Information
33 Act, 5 U.S.C. §552, as amended by Pub. L. No. 93-504, 88 Stat.
34 §1561, to require defendants to permit access to certain records
35 in their possession.

36 2. This Court has jurisdiction over this action pursuant
37 to 5 U.S.C. §552(a)(4)(B).

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3. Plaintiff, JUDITH KATHERINE EILEEN (nee DEMOOR)
(CAMPELL) EXNER is a resident of San Diego County, California.

4. Defendant Federal Bureau of Investigation is an
agency of the United States and has possession of the records to
which plaintiff seeks access.

5. Defendant Clarence M. Kelley is the Director of the
Federal Bureau of Investigation and initially denied plaintiff's
request.

6. Defendant Department of Justice is an agency of the
United States and is responsible, under its regulations, for re-
viewing appeals from denials by the FBI of requests for records.

7. Defendant Edward H. Levi is the Attorney General of
the United States; the Department of Justice made the final denial

16 of plaintiff's request on February 5, 1976.

17 8. By letter dated December 24, 1975 (a copy of which
18 is attached as Exhibit "A"), plaintiff requested access to all
19 records in the possession of the FBI pertaining to plaintiff.

20 9. By failing to produce or make available said records
21 within the statutory period, Defendant FBI denied plaintiff's re-
22 quest.

23 10. By letter dated November 11, 1976 (a copy of which is
24 attached as Exhibit "B"; plaintiff appealed the initial denial.

25 11. By letter dated January 26, 1976 (exhibit C) plaintiff request-
26 ed preference and specified the justification for such preference.

27 12. By letter dated February 5, 1976 (a copy of which
28 is attached as Exhibit "D", Quinlan J. Shea, Chief, Freedom of In-
29 formation Appeals Unit, Office of the Deputy Attorney General,
30 denied said appeal.

31 13. Pursuant to 5 U.S.C. §552(a)(3), plaintiff is en-
32 titled to access to the requested records, and there is no legal

1
2
3 basis for defendants' denial of such access, nor has any such
4 basis for denial been raised by defendants in response to plaintiff's
5 request and appeal.

6 WHEREFORE, plaintiff prays that the Court (1) order
7 defendants to permit access to the requested records; (2) provide
8 for expeditious proceedings in this action as provided in 5 U.S.C.
9 §552(a) (4) (D); (3) award plaintiff her costs and reasonable
10 attorneys' fees in this action; and (4) grant such other and
11 further relief as the Court may deem just and proper.

12 DATED: San Diego, California
13 February 6, 1975

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BRIAN D. MONAGHAN

Suite 11324 - Security Pacific Plaza
1200 Third Avenue
San Diego, California 92101
(714) 232-6254

Counsel for Plaintiff

BRIAN D. MONAGHAN

ATTORNEY AT LAW

SECURITY PACIFIC PLAZA

1200 THIRD AVENUE, SUITE 1324

SAN DIEGO, CALIFORNIA 92101

(714) 232-6254

December 24, 1975


Freedom of Information Unit
Federal Bureau of Investigation
Washington, D. C. 20535

Re: Judith (Campbell) Exner

Gentlemen:

My client, Judith Katherine Eileen (nee Immer) (Campbell) Exner who was born January 11, 1934, in New York, New York, hereby requests access to any and all records filed under any of her names with the Federal Bureau of Investigation. Her Social Security Number is 550-48-2363. Enclosed is a notarized statement to that effect. Please furnish this information to her at the above address.

Sincerely,


Brian D. Monaghan

BDM:maw

116928

62 -
ENCLOSURE

EXHIBIT "A"

I, JUDITH KATHERINE EILEEN (nee IMMOCK) (CAMPBELL) EXNER, having a date of birth of January 11, 1934, in New York, New York, and having a Social Security Number of 550-48-2363, request access to any and all records filed under any of my names with the Federal Bureau of Investigation.

DATED: December 23, 1975.

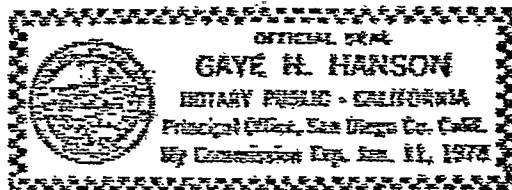
Judith Katherine Eileen Campbell Exner
JUDITH KATHERINE EILEEN (nee IMMOCK)
(CAMPBELL) EXNER

STATE OF CALIFORNIA)

ss

COUNTY OF SAN DIEGO)

On December 23, 1975, before the undersigned, a Notary Public for the State of California, personally appeared JUDITH KATHERINE EILEEN (nee IMMOCK) (CAMPBELL) EXNER, known to me to be the person whose name is subscribed to the within instrument, and acknowledged that she executed the same.



Gaye H. Hanson

116923

62 ~~442222~~

BRIAN D. MONAGHAN

ATTORNEY AT LAW

SEVENTH PACIFIC PLAZA

1200 THIRD AVENUE, SUITE 1324

SAN DIEGO, CALIFORNIA 92101

TEL 232-5254

January 11, 1976

Deputy Attorney General
Harold Tyler
Department of Justice
Washington, D. C. 20035

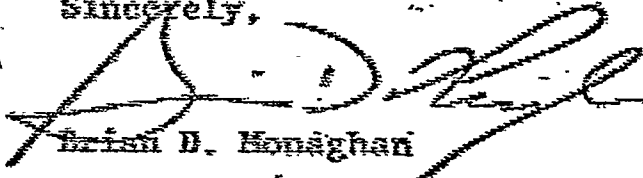
Re: Judith (Campbell) Exner

Gentlemen:

By letter dated December 24, 1975, I requested access to any and all files or records under the name or names of Judith Katherine Eilaen (nee Immoor) (Campbell) Exner, pursuant to the Freedom of Information Act, 5 U.S.C. 552. Ten working days having elapsed, I deem my request denied and hereby appeal that denial. For your convenience I have enclosed a copy of my request letter.

If you do not act upon my appeal within twenty (20) working days, I will deem my request denied.

Sincerely,


Brian D. Monaghan

BDM:mas

Enclosure

cc: Ms. Judith (Campbell) Exner

116929

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BRIAN D. MONAGHAN

ATTORNEY AT LAW

SECURITY PACIFIC PLAZA

1200 THIRD AVENUE, SUITE 1324

SAN DIEGO, CALIFORNIA 92101

(714) 232-6254

January 26, 1976

Department of Justice
Freedom of Information Appeals Unit
Washington, D.C. 20035
Attn: Mr. Quinn Shea

Re: Judith (Campbell) Exner

Dear Quinn:

In our recent telephone conversation, you requested specification of reasons why the Judith (Campbell) Exner file held by the FBI should be given priority with respect to its disclosure. For the following reasons, I feel strongly that the sequential order of examination of requests under the Freedom of Information Act should not apply and that she should have her file at the earliest possible moment:

1. It is obvious from the factual background that has been so prominent in the media lately that she is in physical danger until such time as all of her recollections are committed to a writing. You will recall that Sam Giancana was murdered approximately one week prior to the time that he was to testify. This fear of physical danger was the primary reason for my client coming forward after the Senate Select Committee leaked portions of her testimony in such a way as to allow speculation that she knew of the assassination plot.
2. The document which will be produced will be of historical significance. It is obvious that unless the background data is obtained, many of the facts may be clouded by an inability to recollect. It is in the interests of all parties that the facts when stated be accurate and correct but this is totally within the control of the Federal Bureau of Investigation at this point. I am referring not only to the potential for libel suits arising out of the book, but also to the American peoples' right to know the true facts in general.
3. You indicated that many requests to the FBI in the past have been of a frivolous nature. This is clearly not such a case since she physically viewed the file during her testimony

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EXHIBIT "C"

before the Senate Select Committee and had portions read to her. Consequently, this is not analogous to a situation where a radical student body president suspects that there might be something on him somewhere in a FBI file and is spurred by mere curiosity.

4. From an equitable viewpoint (if such a concept still exists), these files have been used against her and selected portions of them have been leaked to the press; it would only seem fair that she have a right to see them.

5. These items would appear to fall within none of the exceptions to the Freedom of Information Act since no investigation is presently underway as to her and the other key figures involved; that is, John F. Kennedy and Sam Giancana are both deceased.

While I recognize that this may be the sort of "hot potato" that is passed bureaucratically back and forth, it would seem that the foregoing reasons would necessitate someone making a decision to make these materials available to her. Anything that can be done to expedite this decision would be greatly appreciated.

Kindest regards,


Brian D. Monaghan

BDM:df

cc: Federal Bureau of Investigation
Attn: Freedom of Information Act



OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

FEB 9 1976

12

FEB 5 1976

Brian D. Monaghan, Esquire
Attorney at Law
Security Pacific Plaza
1200 Third Avenue, Suite 1324
San Diego, California 92101

Dear Brian:

This is in response to your letter of January 26, 1976, in which you set forth a list of reasons why you believe that the pending request and appeal of your client, Judith Campbell Exner, should be given priority of handling over the several thousand previous requests still pending in the F.B.I.

I am sending a copy of your letter and my reply to Director Kelley for his consideration. In my personal view, however, the case for preferential treatment is unpersuasive. Although I understand your point of view, I do not accept the parallel between Ms. Exner's case and that of Sam Giancana. As stated by you, I find the argument that Ms. Exner is in physical danger to be really nothing more than that -- an argument. As to historical significance, this claim can also be made, at least as validly, on behalf of many of the other requesters who are patiently awaiting their respective turns in line. Although it is true that many requests to the F.B.I. have been of a frivolous nature, many others have not. It is unfortunate, but equally true, that the Freedom of Information and Privacy Acts provide no valid basis for distinguishing between sincere and well-intentioned requesters and those who are simply seeking to harass the F.B.I. To sum it all up, I perceive a situation in which the requester has a strong desire to obtain her file as quickly as possible -- a desire she shares with literally thousands of other persons.



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EXHIBIT "A"

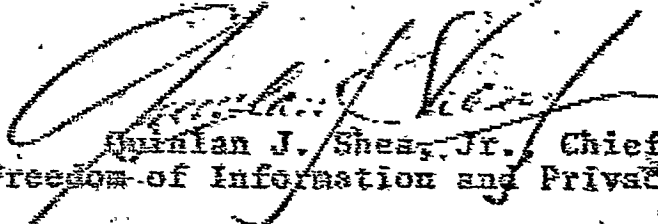
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I do not, however, see a situation in which the need of your client for preferential handling is so clear that I would be justified in intruding upon the internal processes of the F.B.I. in this matter, even though it is my present understanding that the Bureau does not intend to give Ms. Exner any preference.

I thoroughly enjoyed our recent telephone conversation and wish that my response could be in accord with your desires. My basic sense of fairness, however, leads me to the conclusion that Ms. Exner should wait her turn -- a conclusion that I consider to be fully consistent with what I consider to be the basic intent of Congress in this area.

You may, if you choose to do so, elect to treat this letter as a denial of your administrative appeal by the Deputy Attorney General and seek relief in the courts. Your client has the right to sue in the judicial district in which she resides, or in which she has her principal place of business, or in the District of Columbia, which is also where the records she seeks -- if, indeed, they exist at all -- are located.

Best regards,


Julian J. Shear, Jr., Chief
Freedom of Information and Privacy Unit

United States District Court

FOR THE
SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff,

CIVIL ACTION FILE NO. 76-0089-S

FEDERAL BUREAU OF INVESTIGATION,

CLARENCE M. KELLEY, Director,
Federal Bureau of Investigation

10th Street and Pennsylvania
Avenue, N.W.,
Washington, D.C. 20535

UNITED STATES DEPARTMENT OF
JUSTICE, and

EDWARD H. LEVI, Attorney
General of the United States
Department of Justice Building
10th Street and Pennsylvania
Avenue, N.W.,
Washington, D. C. 20530,

Defendants.

SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon

ENCLOSURE

62 - 116925

BRIAN D. MONAGHAN

15

plaintiff's attorney, whose address

1324 Security Pacific Plaza
1200 Third Avenue
San Diego, California 92101

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

WILLIAM W. LUDDY

Clerk of Court

By

R. G. ROSALES

R. G. ROSALES

Deputy Clerk

Date: February 10, 1976

(Seal of Court)

Note: This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

FILED IN CASE NO. 116929

62

116929

CIVIL COVER SHEET

PLAINTIFFS

JUDITH KATHERINE EZNER

DEFENDANTS

FEDERAL BUREAU OF INVESTIGATION; CLARENCE
M. KELLEY; UNITED STATES DEPARTMENT OF
JUSTICE and EDWARD H. LEVI

ATTORNEYS (GIVE NAME, ADDRESS, AND TELEPHONE NUMBER)

BRIAN D. MONACHAN
1200 Third Avenue, Suite 1324
San Diego, California 92101
Telephone: (714) 232-6254

ATTORNEYS OF RECORD

FOR OFFICIAL USE
FILE NO.
DATE
FILED
FILE NO.

76-87-5

PLACE AN ☒ IN ONE BOX ONLY

BASE OF JURISDICTION

IF DIVERSITY, INDICATE
RESIDENCE BELOW.

☒ U.S. PLAINTIFF ☒ U.S. DEFENDANT ☐ FEDERAL QUESTION
(U.S. NOT A PARTY) ☐ DIVERSITY

CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE)

Action under Freedom of Information Act, 5 U.S.C. §552 as amended by
Pub. L. No. 93-504, 88 Stat. 1561, to obtain the files of the F.B.I on the
plaintiff.

62 - 116923

(PLACE AN ☐ IN ONE BOX ONLY)

NATURE OF SUIT

(PLACE AN ☐ IN ONE BOX ONLY)

CONTRACT	TORTS	ACTIONS UNDER STATUTES		
		CIVIL RIGHTS	FORFEITURE/PENALTY	PROPERTY RIGHTS
<input type="checkbox"/> 110 INSURANCE <input type="checkbox"/> 112 MARINE <input type="checkbox"/> 113 MILLER ACT <input type="checkbox"/> 114 NEGOTIABLE INSTRUMENT <input type="checkbox"/> 115 RECOVERY OF OVERPAYMENT & ENFORCEMENT OF JUDGMENT <input type="checkbox"/> 116 OTHER CONTRACT <input type="checkbox"/> 117 CONTRACT PRODUCT LIABILITY	<input type="checkbox"/> 120 PERSONAL INJURY <input type="checkbox"/> 121 AIRPLANE <input type="checkbox"/> 122 AIRPLANE PRODUCT LIABILITY <input type="checkbox"/> 123 ASSEMBLY, LABEL & SLANDER <input type="checkbox"/> 124 FEDERAL EMPLOYERS' LIABILITY <input type="checkbox"/> 125 MARINE <input type="checkbox"/> 126 MARINE PRODUCT LIABILITY <input type="checkbox"/> 127 MOTOR VEHICLE <input type="checkbox"/> 128 MOTOR VEHICLE PRODUCT LIABILITY <input type="checkbox"/> 129 OTHER PERSONAL INJURY <input type="checkbox"/> 130 PERSONAL INJURY PRODUCT LIABILITY <input type="checkbox"/> 131 REAL PROPERTY <input type="checkbox"/> 132 FRAUD OR TRUTH IN LENDING <input type="checkbox"/> 133 OTHER PERSONAL PROPERTY DAMAGE <input type="checkbox"/> 134 REAL PROPERTY DAMAGE <input type="checkbox"/> 135 REAL PROPERTY DAMAGE PRODUCT LIABILITY	<input type="checkbox"/> 441 VOTING <input type="checkbox"/> 442 HOUSING <input type="checkbox"/> 443 ACCOMMODATIONS <input type="checkbox"/> 444 WELFARE <input type="checkbox"/> 445 OTHER CIVIL RIGHTS <input type="checkbox"/> 510 VACATE SENTENCE (2255) <input type="checkbox"/> 511 PAROLE ORL REVIEW <input type="checkbox"/> 512 HAZARD COMPLAINT <input type="checkbox"/> 513 WANDAMUS & OTHER <input type="checkbox"/> 514 CIVIL RIGHTS	<input type="checkbox"/> 610 AGRICULTURE <input type="checkbox"/> 611 FOOD & DRUG <input type="checkbox"/> 612 LIQUOR LAWS <input type="checkbox"/> 613 R.A. & TRUCK <input type="checkbox"/> 614 AIR LINE REGS. <input type="checkbox"/> 615 OCCUPATIONAL SAFETY/HEALTH <input type="checkbox"/> 616 OTHER <input type="checkbox"/> 710 FAIR LABOR STANDARDS <input type="checkbox"/> 711 LABOR/MENT. RELATIONS <input type="checkbox"/> 712 LABOR/MENT. REPORTING & DISCLOSURE ACT <input type="checkbox"/> 713 RAILWAY LABOR ACT <input type="checkbox"/> 714 OTHER LABOR LITIGATION	<input type="checkbox"/> 810 COPYRIGHT <input type="checkbox"/> 811 PATENT <input type="checkbox"/> 812 TRADEMARK <input type="checkbox"/> 813 OTHER STATUTES <input type="checkbox"/> 814 STATE RE-APPORTIONMENT <input type="checkbox"/> 815 ANTI-TRUST <input type="checkbox"/> 816 BANKRUPTCY TRUSTEE <input type="checkbox"/> 817 BANKS AND BANKING <input type="checkbox"/> 818 COMMERCE ICC RATES, ETC. <input type="checkbox"/> 819 DEPORTATION <input type="checkbox"/> 820 SELECTIVE SERVICE <input type="checkbox"/> 821 SECURITIES COMMODITIES EXCHANGE <input type="checkbox"/> 822 SOCIAL SECURITY <input type="checkbox"/> 823 BLACK LUNG <input type="checkbox"/> 824 TAX SUITS <input type="checkbox"/> 825 AGRICULTURAL ADJ. <input type="checkbox"/> 826 ECONOMIC STABILIZATION ACT <input type="checkbox"/> 827 ENVIRONMENTAL MATTERS <input type="checkbox"/> 828 ENERGY ALLOCATION ACT <input type="checkbox"/> 829 CONSTITUTIONALITY OF STATE STATUTES <input type="checkbox"/> 830 NARA, TITLE III <input type="checkbox"/> 831 OTHER STATUTORY ACTIONS

(PLACE AN ☐ IN ONE BOX ONLY)

ORIGIN

(PLACE AN ☐ IN ONE BOX ONLY)

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DATE

February 9, 1976

SIGNATURE OF ATTORNEY OF RECORD

UNITED STATES DISTRICT COURT

BRIAN D. MONACHAN

JS-61c (Rev. 1/75)

116923

BRIAN D. MONAGHAN
ATTORNEY AT LAW
SECURITY PACIFIC PLAZA
1200 THIRD AVENUE, SUITE 1324
SAN DIEGO, CALIFORNIA 92101
(714) 232-6254

January 26, 1976

Department of Justice
Freedom of Information Appeals Unit
Washington, D.C. 20035
Attn: Mr. Quinn Shea

Re: Judith (Campbell) Exner

Dear Quinn:

In our recent telephone conversation, you requested specification of reasons why the Judith (Campbell) Exner file held by the FBI should be given priority with respect to its disclosure. For the following reasons, I feel strongly that the sequential order of examination of requests under the Freedom of Information Act should not apply and that she should have her file at the earliest possible moment:

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3. You indicated that many requests to the FBI in the past have been of a frivolous nature. This is clearly not such a case since she physically viewed the file during her testimony

ST-105

REC-75

62-116721-
10-5

17 JAN 28 1976

E.O.I.A.

12/30/75
JAN 13 1976

Department of Justice
January 26, 1976
Page Two

before the Senate Select Committee and had portions read to her. Consequently, this is not analogous to a situation where a radical student body president suspects that there might be something on him somewhere in a FBI file and is spurred by mere curiosity.

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Kindest regards,

BRIAN D. MONAGHAN

Brian D. Monaghan

BDM:df

cc: Federal Bureau of Investigation
Attn: Freedom of Information Act

FEB 5 1976

Brian D. Monaghan, Esquire
Attorney at Law
Security Pacific Plaza
1200 Third Avenue, Suite 1324
San Diego, California 92101

Dear Brian:

This is in response to your letter of January 26, 1976, in which you set forth a list of reasons why you believe that the pending request and appeal of your client, Judith Campbell Exner, should be given priority of handing over the several thousand previous requests still pending in the F.B.I.

I am sending a copy of your letter and my reply to Director Kelley for his consideration. In my personal view, however, the case for preferential treatment is unpersuasive. Although I understand your point of view, I do not accept the parallel between Ms. Exner's case and that of Sam Giancana. As stated by you, I find the argument that Ms. Exner is in physical danger to be really nothing more than that -- an argument. As to historical significance, this claim can also be made, at least as validly, on behalf of many of the other requesters who are patiently awaiting their respective turns in line. Although it is true that many requests to the F.B.I. have been of a frivolous nature, many others have not. It is unfortunate, but equally true, that the Freedom of Information and Privacy Acts provide no valid basis for distinguishing between sincere and well-intentioned requesters and those who are simply seeking to harass the F.B.I. To sum it all up, I perceive a situation in which the requester has a strong desire to obtain her file as quickly as possible -- a desire she shares with literally thousands of other persons.

Clarence M. Kelley ST-105

ENCLOSURE

Monaghan

54 OCT 13 1976

F.O.I.A.

I do not, however, see a situation in which the need of your client for preferential handling is so clear that I would be justified in intruding upon the internal processes of the F.B.I. in this matter, even though it is my present understanding that the Bureau does not intend to give Ms. Exner any preference.

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Best regards,

Quinlan J. Shea, Jr., Chief
Freedom of Information and Privacy Unit

TO: Special Investigative Division

FROM: ☐ Intelligence ☐ General Investigative ☐ Special Investigative

FOIA

REQUEST FOR SEARCH OF SPECIAL INDICES

Date of request	Requesting Agent
<div style="border: 1px solid black; width: 400px; height: 60px; margin: 10px auto;"></div>	
Please complete following and return one	
Section	<input type="checkbox"/> Intelligence <input type="checkbox"/> General Investigative <input type="checkbox"/> Special Investigative

b6
b7C

NAMES TO BE SEARCHED

KNOWN ALIASES

Results of Criminal and Security
Special Indices Search
(attach separate sheet, if necessary)

b7D

Judy Campbell
 Judith,
 Judith Campbell (Common)
 Judith Exner

Bufile 92-5383

LA 92-3867
 92-934

5/14/62
 First date of
 monitor
 W F P
 W
 11

Bufile _____

Searched by

Date

4/21/76

b6
b7C

TO: DIV. 4
~~Special Investigative Division~~FROM: ☒ Intelligence ☐ General Investigative ☐ Special Investigative

REQUEST FOR SEARCH OF SPECIAL INDICES

Date of request 4/21/76	Requesting Agent SA
----------------------------	--

b6
b7C

Please complete following and return one copy to:

FOIPA Section	, Division -	<input type="checkbox"/> Intelligence <input type="checkbox"/> General Investigative <input type="checkbox"/> Special Investigative <input checked="" type="checkbox"/> Records Management
------------------	--------------	--

NAMES TO BE SEARCHED

KNOWN ALIASES

Results of Criminal and Security
Special Indices Search
(attach separate sheet, if necessary)

Judy Campbell

Judith Campbell Immor
Judith Exner
Judith Campbell Immon

NO RECORD

N/R
N/R
N/R

Bufile _____

Searched by

b6
b7C

Date

4/21/76

UNITED STATES GOVERNMENT

Memorandum

Mr. Philip Mogen

TO : Chief, Litigation Unit
Freedom of Information Unit
Federal Bureau of Investigation

DATE: February 24, 1976

FROM : Rex E. Lee
Assistant Attorney General
Civil Division

REL:JAxelrad:dcb
145-12-2683

SUBJECT: By: Jeffrey Axelrad, Chief
Information and Privacy Unit

Tel: 739-3300

Judith Katherine Exner v. Federal Bureau of
Investigation, U.S.D.C. S.D. Cal., Civil
Action No. 76-0089-S

Enclosed is a copy of the complaint in the above-
entitled matter filed pursuant to 5 U.S.C. §552.

Because the Freedom of Information Act provides that
FOI cases take precedence on the docket, we would appreciate
your providing us a litigation report in duplicate by
March 11, 1976 if possible, which report should include
the following:

1. A statement as to the manner, place, and time of
plaintiff's request to your office to make the records
involved available for his inspection, including four copies--
one certified-- of any documents or other memoranda incorpor-
ating plaintiff's request.

2. Five copies--one certified--of any correspondence
or memoranda of any communication, written or oral, between
your office and the plaintiff concerning plaintiff's request
for the records involved.

3. If the records have been identified and located a
detailed description or summary of the records involved and
a statement as to their current location. If it has not
been possible to identify or locate the records, please
include a statement to this effect.

4. Two copies of any correspondence or memoranda within
your office showing the administrative processing of the
plaintiff's request.

6- ENCLOSURE

2/26/76
Rec'd from Dept.
of Justice

MCT-8

CH 41

1- MAR 2 1976

11-E. P. [Signature]



5010-109

MAR 22 1976

F-59

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

5. A statement of the reason or reasons why in the opinion of your office the record involved should not be made available. Such reasons should be related as directly as possible to the statute, as for example, that the record is available under subsection (a)(1) or (a)(2) of the Act, that the record is exempted from disclosure by some other statute or that the record is within one or more of the other exemptions of subsection (b) of the Act, or that the plaintiff did not comply with the applicable regulations in requesting the record. Where the record falls within one or more of the exemptions of subsection (b) of the Act, such exemption should be specifically identified and discussed.

We suggest that you include in the affidavit or affidavits a statement of facts demonstrating the manner in which production of the records requested would prejudice the operation of your office.

6. Executed original and five copies of an affidavit setting forth facts establishing any defenses you think pertinent. If there are any questions on the form of this affidavit, Jeffrey Axelrad (739-3300) of our office will do his best to assist you.

7. The name and telephone number of the attorney in your office who will be familiar with this.

Enclosure

cc: United States Attorney
San Diego, California 92101

United States District Court

RECEIVED

FEB 10 11 36 AM '76

FOR THE
SOUTHERN DISTRICT OF CALIFORNIAU.S. MARSHAL
SOUTHERN DISTRICT OF
CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff,

vs.

FEDERAL BUREAU OF INVESTIGATION,

CLARENCE M. KELLEY, Director,
Federal Bureau of Investigation10th Street and Pennsylvania
Avenue, N.W.
Washington, D.C. 20535UNITED STATES DEPARTMENT OF
JUSTICE, andEDWARD H. LEVI, Attorney
General of the United States
Department of Justice Building
10th Street and Pennsylvania
Avenue, N.W.
Washington, D. C. 20530,

Defendants.

CIVIL ACTION FILE NO. 76-0089-S

SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon

BRIAN D. MONAGHAN

plaintiff's attorney, whose address

1324 Security Pacific Plaza
1200 Third Avenue
San Diego, California 92101

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

WILLIAM W. LUDDY

Clerk of Court.

By R. G. ROSALES

R. G. ROSALES,

Deputy Clerk.

Date: February 10, 1976

[Seal of Court]

SEAL

Note:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

1 BRIAN D. MONAGHAN, ESQ.
2 1324 Security Pacific Plaza
3 1200 Third Avenue
4 San Diego, California 92101
5 (714) 232-6254

6
7
8 Attorney for Plaintiff

9 UNITED STATES DISTRICT COURT
10 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

11 JUDITH KATHERINE EXNER,
12 Plaintiff,

13 vs.

14 FEDERAL BUREAU OF INVES-
15 TIGATION,

16 CLARENCE M. KELLEY, Director,
17 Federal Bureau of Investi-
18 gation
19 10th Street and Pennsylvania
20 Avenue, N.W.
21 Washington, D.C. 20535

22 UNITED STATES DEPARTMENT OF
23 JUSTICE, and

24 EDWARD H. LEVI, Attorney
25 General of the United States
26 Department of Justice Building
27 10th Street and Pennsylvania
28 Avenue, N.W.
29 Washington, D. C. 20530,
30 Defendants.

CIVIL ACTION NO. 76-00 87-3

31 COMPLAINT FOR INJUNCTIVE RELIEF

32 1. This is an action under the Freedom of Information
Act, 5 U.S.C. §552, as amended by Pub. L. No. 93-504, 88 Stat.
1561, to require defendants to permit access to certain records in
their possession.

2. This Court has jurisdiction over this action pursuant
to 5 U.S.C. §552(a)(4)(B).

1 -----

2 -----

3 3. Plaintiff, JUDITH KATHERINE EILEEN (nec IMMOOR)
4 (CAMPBELL) EXNER is a resident of San Diego County, California.

5 4. Defendant Federal Bureau of Investigation is an
6 agency of the United States and has possession of the records to
7 which plaintiff seeks access.

8 5. Defendant Clarence M. Kelley is the Director of the
9 Federal Bureau of Investigation and initially denied plaintiff's
10 request.

11 6. Defendant Department of Justice is an agency of the
12 United States and is responsible, under its regulations, for re-
13 viewing appeals from denials by the FBI of requests for records.

14 7. Defendant Edward H. Levi is the Attorney General of
15 the United States; the Department of Justice made the final denial
16 of plaintiff's request on February 5, 1976.

17 8. By letter dated December 24, 1975 (a copy of which
18 is attached as Exhibit "A"), plaintiff requested access to all
19 records in the possession of the FBI pertaining to plaintiff.

20 9. By failing to produce or make available said records
21 within the statutory period, Defendant FBI denied plaintiff's re-
22 quest.

23 10. By letter dated November 11, 1976 (a copy of which is
24 attached as Exhibit "B", plaintiff appealed the initial denial.

25 11. By letter dated January 26, 1976^(exhibit C)//plaintiff request-
26 ed preference and specified the justification for such preference.

27 12. By letter dated February 5, 1976 (a copy of which
28 is attached as Exhibit "D", Quinlan J. Shea, Chief, Freedom of In-
29 formation Appeals Unit, Office of the Deputy Attorney General,
30 denied said appeal.

31 13. Pursuant to 5 U.S.C. §552(a)(3), plaintiff is en-
32 titled to access to the requested records, and there is no legal

1 -----

2 -----

3 basis for defendants' denial of such access, nor has any such
4 basis for denial been raised by defendants in response to plaintiff's
5 request and appeal.


6 WHEREFORE, plaintiff prays that the Court (1) order
7 defendants to permit access to the requested records; (2) provide
8 for expeditious proceedings in this action as provided in 5 U.S.C.
9 §552(a)(4)(D); (3) award plaintiff her costs and reasonable
10 attorneys' fees in this action; and (4) grant such other and
11 further relief as the Court may deem just and proper.

12 DATED: San Diego, California
13 February 6, 1975

14

15

16


BRIAN D. MONAGHAN

17

Suite 1324 - Security Pacific Plaza
1200 Third Avenue
San Diego, California 92101
(714) 232-6254

18

19

Counsel for Plaintiff

20

21

22

23

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32

TREAT AS CONFIDENTIAL
INVESTIGATIONS SECTION

Transmitted by Facsimile - PLAINTEXT

Director, FBI
to: Office of Legal Counsel

Re: SAC - SD - 66-1761

Judith Campbell Exner, aka
Judith Campbell Exnerfor
TELETYPE

Date 2/19/76

Time Transmitted -

Received -

☐ Fingerprint Photo☐ Fingerprint Record☐ Map☐ Newspaper clipping☐ Photograph☐ Article Clipping☐ Other *Summons*☐ (6 in)☐ (4 in)

Special Handling Instructions:

*Summons was served by U.S. Marshals
on SAC Ronald Moley.*

Approved: _____

62 60

REC-3

62-110927-3

EX-111

5 MAR 1976

*M. Charles*5 MAR 19 1976
FBI

Assoc. Dir.	_____
Dep.-A.D.-Adm.	_____
Dep.-A.D.-Inv.	_____
Asst. Dir.:	_____
Admin.	_____
Comp. Syst.	_____
Ext. Affairs	_____
Files & Com.	_____
Gen. Inv.	_____
Ident.	_____
Inspection	_____
Intell.	_____
Laboratory	_____
Plan. & Eval.	_____
Spec. Inv.	_____
Training	_____
Legal Coun.	_____
Telephone Rm.	_____
Director Sec'y	_____

3-2-1971

5-2-1975

United States District Court

FOR THE

SOUTHERN DISTRICT OF CALIFORNIA

RECEIVED

FEB 18 11 35 AM '76

U.S. MARSHAL
SOUTHERN DISTRICT OF
CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff,

CIVIL ACTION FILE NO. 76-0089-2

FEDERAL BUREAU OF INVESTIGATION,

CLARENCE M. KELLEY, Director,
Federal Bureau of Investi-
gation10th Street and Pennsylvania
Avenue, N.W.
Washington, D.C. 20535UNITED STATES DEPARTMENT OF
JUSTICE, andEDWARD H. LEVI, Attorney
General of the United States
Department of Justice Building
10th Street and Pennsylvania
Avenue, N.W.
Washington, D. C. 20530,

Defendants.

SUMMONS

To the above named Defendants:

You are hereby summoned and required to serve upon.

BRIAN D. MINAGHAN

62-116729-

1A
plaintiff's attorney, whose address

1324 Security Pacific Plaza
1200 Third Avenue
San Diego, California 92101

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

WILLIAM W. LADDY

Clerk of Court

By R. G. ROSALES

R. G. ROSALES

Deputy Clerk

Date: February 10, 1976



NOTE: This summons is issued pursuant to Rule 6 of the Federal Rules of Civil Procedure.

RECEIVED

FEB 9 11 57 AM '76

U.S. MARSHAL
SOUTHERN DISTRICT OF
CALIFORNIA

FILED

FEB 6 - 1976

CLERK U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ENTRY

MERIAN D. MONAGHAN, ESQ.
1324 Security Pacific Plaza
1295 Third Avenue
San Diego, California 92101
(619) 232-6254

Attorney for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,
Plaintiff,

CIVIL ACTION NO. 76-89-S

FEDERAL BUREAU OF INVESTIGATION,

CLARENCE M. KELLEY, Director,
Federal Bureau of Investi-
gation
10th Street and Pennsylvania
Avenue, N.W.
Washington, D.C. 20535

62-116939-

UNITED STATES DEPARTMENT OF
JUSTICE, and

EDWARD H. LEVI, Attorney
General of the United States
Department of Justice Building
11th Street and Pennsylvania
Avenue, N.W.
Washington, D. C. 20530,

Defendants.

COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act, 5 U.S.C. §552, as amended by Pub. L. No. 93-504, 88 Stat. 1561, to require defendants to permit access to certain records in their possession.

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. §552(a)(4)(B).

3. Plaintiff, JUDITH KATHERINE EILEEN (nee DMOOR)
(CAMPBELL) EXNER is a resident of San Diego County, California.

4. Defendant Federal Bureau of Investigation is an agency of the United States and has possession of the records to which plaintiff seeks access.

5. Defendant Clarence M. Kelley is the Director of the Federal Bureau of Investigation and initially denied plaintiff's request.

6. Defendant Department of Justice is an agency of the United States and is responsible, under its regulations, for reviewing appeals from denials by the FBI of requests for records.

7. Defendant Edward H. Levi is the Attorney General of the United States; the Department of Justice made the final denial of plaintiff's request on February 5, 1976.

8. By letter dated December 24, 1975 (a copy of which is attached as Exhibit "A"), plaintiff requested access to all records in the possession of the FBI pertaining to plaintiff.

9. By failing to produce or make available said records within the statutory period, Defendant FBI denied plaintiff's request.

23 10. By letter dated November 11, 1976 (a copy of which is
24 attached as Exhibit "B", plaintiff appealed the initial denial
25 (exhibit C)

26 11. By letter dated January 26, 1976//plaintiff request-
27 ed preference and specified the justification for such preference.

28 12. By letter dated February 5, 1976 (a copy of which
29 is attached as Exhibit "D", Quinlan J. Shea, Chief, Freedom of In-
30 formation Appeals Unit, Office of the Deputy Attorney General,
31 denied said appeal.

32 13. Pursuant to 5 U.S.C. §552(a)(3), plaintiff is en-
33 titled to access to the requested records, and there is no legal

basis for defendants' denial of such access, nor has any such
basis for denial been raised by defendants in response to plaintiff's
request and appeal.

WHEREFORE, plaintiff prays that the Court (1) order
defendants to permit access to the requested records; (2) provide
for expeditious proceedings in this action as provided in 5 U.S.C.
§ 552(a)(4)(B); (3) award plaintiff her costs and reasonable
attorneys' fees in this action; and (4) grant such other and
further relief as the Court may deem just and proper.

WITNESSED: San Diego, California
February 6, 1975


BRIAN D. MONAGHAN

Suite 1324 - Security Pacific Plaza
1200 Third Avenue
San Diego, California 92101
(714) 232-6254

Counsel for Plaintiff

12
13
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15
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19
20
21
22

Assistant Attorney General
Civil Division
Attn: Jeffrey Axelrad

March 15, 1976

Director, FBI

1 - Mr. McDermott
Attn: Mr. Hanigan
1 - Mr. Mintz
1 - FOIA Litigation
(Mr. Moschella)

JUDITH CAMPBELL EXNER v.
FEDERAL BUREAU OF INVESTIGATION, et al.
(U.S.D.C., S.D. CALIFORNIA)
CIVIL ACTION NO. 76-0089-S

Reference is made to memorandum of Jeffrey Axelrad, Chief, Information and Privacy Unit, Civil Division, dated February 24, 1976, his reference REL: JAxelrad:dcg 145-12-2683, in which a litigation report in captioned matter was requested.

For your information, by letter dated December 24, 1975, plaintiff through her attorney, Brian D. Monaghan, made a request pursuant to the Freedom of Information Act (FOIA) for access to "any and all records filed under any of her names with the Federal Bureau of Investigation." By letter dated January 15, 1976, we responded to that request advising Mr. Monaghan that due to the exceedingly heavy volume of FOIA requests substantial delays in processing requests of this type are being experienced. Mr. Monaghan corresponded with Mr. Quinn Shea by letter dated January 26, 1976, requesting preferential treatment in the processing of his client's request. Both Mr. Shea and Director Kelley responded to that appeal for preferential treatment by their letters dated February 5, 1976, and February 19, 1976, respectively, and in each case denied his right to such treatment.

The following are proposed answers to specific allegations in plaintiff's amended complaint:

Paragraph One: This paragraph generally alleges the jurisdiction of the court and is not an allegation of fact for which an answer is required, but insofar as an answer may be deemed required, it is denied.

EPM:lsy:jd
(7)

ST-107

REC-11

62-116924-4

MAR 17 1976

8- ENCLOSURE

Assoc. Dir. _____
Dep. AD Adm. _____
Dep. AD Inv. _____
Asst. Dir.: _____
Admin. _____
Comp. Syst. _____
Ext. Affairs _____
Files & Com. _____
Gen. Inv. _____
Ident. _____
Inspection _____
Intell. _____
Laboratory _____
Plan. & Eval. _____
Spec. Inv. _____
Training _____
Legal Coun. _____
Telephone Rm. _____
Director Sec'y _____

56 MAR 10 3 1976

TELETYPE UNIT ☐

Assistant Attorney General
Civil Division

Paragraph Two: Defendants have insufficient information upon which to form a belief as to the truth or falsity of the first sentence; therefore, it is denied. The balance of this paragraph should be denied, except to admit the authenticity of plaintiff's Exhibits One through Four to which the court is respectfully referred for a complete and accurate statement of the contents thereof.

Paragraph Three: Admit, except to deny that the FBI is an agency of the United States and that defendant Kelley denied plaintiff's request to review her records.

Paragraph Four: Deny, except to admit receipt of a letter dated December 24, 1975, to which the court is respectfully referred for a complete and accurate statement of the contents thereof.

Paragraph Five: The first sentence of this paragraph constitutes a conclusion of law and not an allegation of fact for which an answer is required, but insofar as an answer may be deemed required, it is denied. The balance of this paragraph is denied, except to admit receipt of a letter dated January 11, 1976, to which the court is respectfully referred for the complete and accurate statement of the contents thereof.

Paragraph Six: Deny, except to admit transmittal of a letter dated January 15, 1976, to which the court is respectfully referred for the complete and accurate statement of the contents thereof.

Paragraph Seven: Deny, except to admit transmittal of a letter dated February 5, 1976, to which the court is respectfully referred for the complete and accurate statement of the contents thereof.

Paragraph Eight: Defendants have insufficient information upon which to form a belief as to the truth or falsity of the allegations contained herein; therefore, they are denied.

Assistant Attorney General
Civil Division

Paragraph Nine: This paragraph allegedly quotes certain portions of the legislative history regarding the Privacy Act of 1974 and is not an allegation of fact for which an answer is required, but insofar as an answer may be deemed required, it is denied.

Paragraph Ten: This paragraph contains a conclusion of law and not an allegation of fact for which an answer is required, but insofar as an answer may be deemed required, it is denied.

Paragraph Eleven: This paragraph contains a conclusion of law and not an allegation of fact for which an answer is required, but insofar as an answer may be deemed required, it is denied.

Paragraph Twelve: Plaintiff is not entitled to the relief prayed for or any relief whatsoever.

Affirmative Defenses:

(1) Failure to state a claim upon which relief may be granted.

(2) Inasmuch as no documents have been improperly withheld within the meaning of Title 5, United States Code, Section 552 (a) (4) (B), the United States District Court is without jurisdiction in this matter.

(3) Defendants Edward H. Levi, Clarence M. Kelley, and the Federal Bureau of Investigation are not proper party defendants to this action as they are not agencies within the meaning of Title 5, United States Code, Section 552 (a) (4) (B).

It is requested that your office file an appropriate motion requesting the court to dismiss the action for want of jurisdiction or, in the alternative, to stay proceedings pursuant to Title 5, United States Code, Section 552 (a) (6) (C). It is noted that the United States District Court may assume jurisdiction until such time as it has determined that no documents have been improperly withheld. While various provisions of Title 5, United States Code, Section 552 (a) (6) (B) allow a requester to consider failure to comply with the time limits therein as an exhaustion of remedies (procedural matter), these provisions do not create a substantive presumption of improper withholding.

Assistant Attorney General
Civil Division

It is noted that while the court may stay the proceedings pursuant to Title 5, United States Code, Section 552 (a) (6) (C), it may also dismiss the action for want of jurisdiction. The strict time limits were inserted in the 1974 amendments to guard against certain abuses, i.e., "to use interminable delays to avoid embarrassment, to delay the impact of disclosure, or to wear down and discourage the requester." (See S. Rep. No. 93-854, 93d Cong., 2d Sess., p. 26.) I can assure you that the delay herein is not founded on any of the aforementioned abuses, but is clearly based on exceptional circumstances within the meaning of Title 5, United States Code, Section 552 (a) (6) (C).

Special Agent Emil P. Moschella of our Legal Counsel Division has been assigned to handle the defense in this suit and may be reached by telephone at 202-324-4522 or Departmental Code 175-4522.

1 - United States Attorney
Southern District of California



ENCLOSURE

P372

62-116929-4

1 RICHARD C. LEONARD
2 Attorney at Law
3 2404 Wilshire Boulevard
Suite 400
Los Angeles, CA 90057

4 (213) 380-3330

5 Attorney for Plaintiff

*please
send to DOJ*

6
7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10
11 JUDITH KATHERINE EXNER,) CIVIL ACTION NO. 76-89-S
12)
Plaintiff,) AMENDED COMPLAINT FOR INJUNC-
13) TIVE RELIEF UNDER THE PRIVACY
-vs-) ACT OF 1974 AND THE FREEDOM
14) OF INFORMATION ACT.
FEDERAL BUREAU OF INVESTIGATION,)
15 CLARENCE M. KELLEY, Director,)
Federal Bureau of Investigation,)
16 UNITED STATES DEPARTMENT OF)
JUSTICE, and EDWARD H. LEVI,)
17 Attorney General of the United)
States,)
18 Defendants.)
19

20 Plaintiff, Judith Katherine Exner [hereinafter "Exner"],
21 brings this action against the defendants, Federal Bureau of
22 Investigation [hereinafter sometimes "FBI"], Clarence M. Kelley,
23 Director of the FBI [hereinafter sometimes "Kelley"], United
24 States Department of Justice, and Edward H. Levi, Attorney General
25 of the United States [hereinafter sometimes "Levi"], [the FBI,
26 the Department of Justice, Kelley, and Levi are hereinafter
27 sometimes collectively referred to as the "Government"], and
28 complains and alleges as follows:
29

30 JURISDICTION AND VENUE

31 1. This action is brought, and this Court has juris-
32 diction over this action, pursuant to the Privacy Act of 1974,

*See memo to AAG, CPO,
3/11/76 EPM: day*

*Rec'd from
Sept by R/S
3/4/76*

115 Pbu

1 5 U.S.C. §552a, and the Freedom of Information Act, 5 U.S.C.
2 §552, as hereinafter more fully appears.

3 2. Plaintiff Judith Katherine Exner [previously known
4 as Judith Campbell (Nee Immoor)] is an individual who resides
5 within the Southern District of California. Pursuant to the
6 provisions of the Privacy Act of 1974, and the Freedom of Infor-
7 mation Act, plaintiff has made proper demand upon the United
8 States, through its agencies, the FBI and the Department of
9 Justice, to review certain files and records maintained by the
10 FBI relating to the plaintiff. The Government has refused to
11 turn over these records to the plaintiff, and plaintiff has
12 exhausted her administrative remedies in this regard.

13 3. The Department of Justice and the FBI are both
14 agencies of the United States. The FBI has possession of records
15 to which the plaintiff seeks access. Pursuant to the regulations
16 issued by the Department of Justice relating to the Privacy Act
17 of 1974 and the Freedom of Information Act, the Department of
18 Justice is the agency responsible for reviewing appeals from
19 denials by the FBI of requests for records under both the Freedom
20 of Information Act and the Privacy Act. Defendant Kelley is the
21 Director of the FBI, and is the person who initially denied
22 plaintiff's request to review her records. Defendant Levi is
23 the Attorney General of the United States.

24
25 FACTUAL BACKGROUND

26 4. On December 24, 1975, at the request of plaintiff,
27 and with her authority, a letter was written to the Federal
28 Bureau of Investigation requesting access to any and all records
29 relating to the plaintiff contained in the files and records of
30 the FBI. A copy of this letter is attached hereto as Exhibit "1"
31 and incorporated herein by this reference.

1 5. In accordance with the provisions of the Freedom
2 of Information Act and the Privacy Act, the failure of the FBI
3 to respond to plaintiff's request within ten working days con-
4 stituted a denial of plaintiff's request. Noting the failure
5 of the FBI to respond to her request, plaintiff, by her authorized
6 agent, sent a letter to the Department of Justice dated January
7 11, 1976. In that letter, plaintiff indicated that she deemed
8 her previous request denied, and appealed that denial directly
9 to the Department of Justice. A copy of the January 11, 1976,
10 letter is attached hereto as Exhibit "2" and incorporated herein
11 by this reference.

12 6. By letter dated January 15, 1976, over the signature
13 of Clarence M. Kelley, the Federal Bureau of Investigation of
14 the United States Department of Justice responded to plaintiff's
15 earlier letters. After acknowledging receipt of plaintiff's
16 Freedom of Information and Privacy Act requests, the FBI requested
17 additional time to research its files in order to determine
18 whether any records were available.

19 7. By letter dated February 5, 1976, over the signature
20 of Quinlan J. Shea, Jr., Chief, Freedom of Information and
21 Privacy Unit of the Office of the Attorney General of the United
22 States, plaintiff's Privacy Act and Freedom of Information Act
23 requests were denied. A copy of the February 5, 1976, letter
24 from Mr. Shea is attached hereto as Exhibit "4" and incorporated
25 herein by this reference:

26
27 THE REASONS FOR PLAINTIFF'S REQUEST

28 TO REVIEW THE FBI DOCUMENTS

29 7. Plaintiff is informed and believes, and based on
30 such information and belief alleges that the Federal Bureau of
31 Investigation has maintained records relating to plaintiff since
32 approximately 1960. In September of 1975, plaintiff was informed

1 of the existence of this file during the course of her testimony
2 in an executive session before the Senate Select Committee to
3 Study Governmental Operations with Respect to Intelligence
4 Activities. Reference to a "top priority investigation" of the
5 plaintiff by the FBI was made not only during the executive
6 Committee session of the Senate Select Committee, but was also
7 contained in the report issued by the Senate Select Committee
8 and published on November 20, 1975. In addition to reference to
9 the FBI investigation of her during the Senate Select Committee's
10 executive session, and in addition to reference to the FBI
11 investigation of her in the Senate Select Committee's report,
12 plaintiff was also aware that she was the subject of an FBI
13 investigation during the early portion of the 1960's.

14 8. During the course of plaintiff's testimony before
15 the Senate Select Committee, it became obvious to plaintiff that
16 information contained in plaintiff's FBI files was inaccurate.
17 Subsequent to her testimony before the Senate Select Committee,
18 this inaccurate information appeared in the official report
19 prepared by the Senate Select Committee. Moreover, information
20 which plaintiff believes emanated from her FBI files was leaked
21 to the press by a member or members of the Senate Select Commit-
22 tee staff. Some of the information leaked to the national press
23 also was inaccurate.

24 9. The legislative history of the Privacy Act of 1974
25 provides, in pertinent part, that the purpose of Congress in
26 enacting the Privacy Act, among other things, was to:

27 "(1) Permit an individual to determine what
28 records pertaining to him are collected, maintained,
29 used, or disseminated by such agencies;

30 "(2) Permit an individual to prevent records
31 pertaining to him obtained by such agencies for a
32 particular purpose from being used or made available

1 for another purpose without his consent;

2 "(3) Permit an individual to gain access to
3 information pertaining to him in Federal agency
4 records, to have a copy made of all or any portion
5 thereof, and to correct or amend such records;

6 "(4) Collect, maintain, use, or disseminate
7 any record of identifiable personal information in
8 a manner that assures that such action is for a
9 necessary and lawful purpose, that the information
10 is current and accurate for its intended use, and
11 that adequate safeguards are provided to prevent
12 misuse of such information; . . ."

13 10. Although plaintiff seeks disclosure of the records
14 both pursuant to the Privacy Act of 1974 and pursuant to the
15 Freedom of Information Act, plaintiff believes that the Privacy
16 Act request must take precedence. The Freedom of Information Act
17 contains an exemption for investigative records compiled for
18 law enforcement purposes, but only to the extent that the pro-
19 duction of such records would:

20 ". . .Constitute an unwarranted invasion of
21 personal privacy. . ." [5 U.S.C. §552(b)(7)(C)]
22 Without first knowing the contents of the full FBI file, which
23 should be made available to plaintiff pursuant to the Privacy
24 Act of 1974, plaintiff believes that matters contained therein
25 might be of such a personal nature that they should not be
26 disclosed to the general public pursuant to the Freedom of
27 Information Act.

28 11. Plaintiff is entitled, pursuant to the Privacy
29 Act of 1974, to review the records maintained on her by the FBI,
30 and to attempt to have the FBI correct any inaccuracies in those
31 records. Plaintiff also believes that she is entitled to receive
32 a copy of the records of the FBI relating to her pursuant to the

1 provisions of the Freedom of Information Act. The Government's
2 denial of access to these records is without any basis. Plaintiff
3 has no other adequate remedy at law or basis on which to pursue
4 this litigation.

5
6 PRAYER FOR RELIEF

7 12. WHEREFORE, plaintiff Judith Katherine Exner prays
8 that the Court adjudge and decree that:

9 (1) Pursuant to the provisions of the Privacy Act
10 of 1974 [5 U.S.C. §552a (g) (3) (A)] enjoin the defendants
11 from withholding the records in their possession relating to
12 the plaintiff from her;

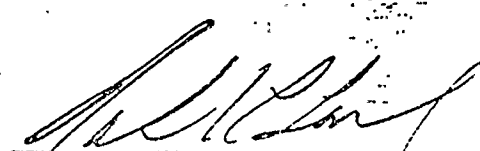
13 (2) Pursuant to the Freedom of Information Act
14 [5 U.S.C. §552(a) (4) (B)] enjoin the defendants from with-
15 holding records relating to the plaintiff from her, and
16 order the defendants to produce the records improperly
17 withheld from her;

18 (3) Plaintiff be awarded her reasonable attorney's
19 fees and costs of litigation;

20 (4) Pending a determination as to whether the
21 FBI records relating to the plaintiff contain information
22 that would invade plaintiff's privacy, enjoin the defendants
23 from distributing that information to any other person; and

24 (5) For such other and further relief as the
25 Court may deem just and proper.

26 DATED: February 19, 1976.

27
28 
29 RICHARD C. LEONARD
30
31
32

BRIAN D. MONAGHAN

ATTORNEY AT LAW

SECURITY PACIFIC PLAZA

1200 THIRD AVENUE, SUITE 1324

SAN DIEGO, CALIFORNIA 92101

(714) 232-6254

December 24, 1975

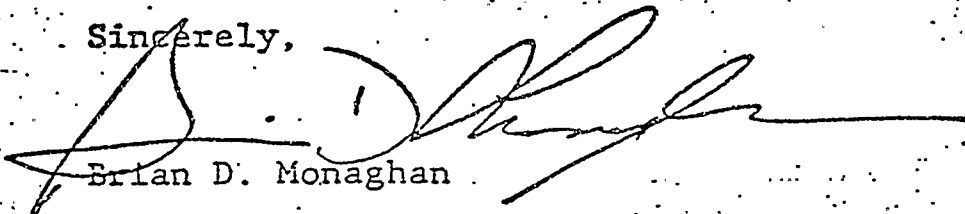
Freedom of Information Unit
Federal Bureau of Investigation
Washington, D. C. 20535

Re: Judith (Campbell) Exner

Gentlemen:

My client, Judith Katherine Eileen (nee Immoor) (Campbell) Exner who was born January 11, 1934, in New York, New York, hereby requests access to any and all records filed under any of her names with the Federal Bureau of Investigation. Her Social Security Number is 550-48-2363. Enclosed is a notarized statement to that effect. Please furnish this information to her at the above address.

Sincerely,



Brian D. Monaghan

BDM:maw

EXHIBIT "1"

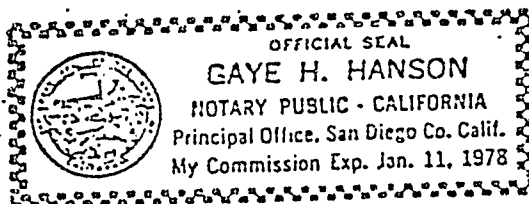
I, JUDITH KATHERINE EILEEN (nee IMMOOR) (CAMPBELL) EXNER, having a date of birth of January 11, 1934, in New York, New York, and having a Social Security Number of 550-48-2363, request access to any and all records filed under any of my names with the Federal Bureau of Investigation.

DATED: December 23, 1975.

Judith Katherine Eileen Campbell
JUDITH KATHERINE EILEEN (nee IMMOOR)
(CAMPBELL) EXNER

STATE OF CALIFORNIA)
COUNTY OF SAN DIEGO) ss

On December 23, 1975, before the undersigned, a Notary Public for the State of California, personally appeared JUDITH KATHERINE EILEEN (nee IMMOOR) (CAMPBELL) EXNER, known to me to be the person whose name is subscribed to the within instrument, and acknowledged that she executed the same.



Gaye H. Hanson

BRIAN D. MONAGHAN

ATTORNEY AT LAW

SECURITY PACIFIC PLAZA

1200 THIRD AVENUE, SUITE 1324

SAN DIEGO, CALIFORNIA 92101

(714) 232-6254

January 11, 1976

Deputy Attorney General
Harold Tyler
Department of Justice
Washington, D. C. 20035

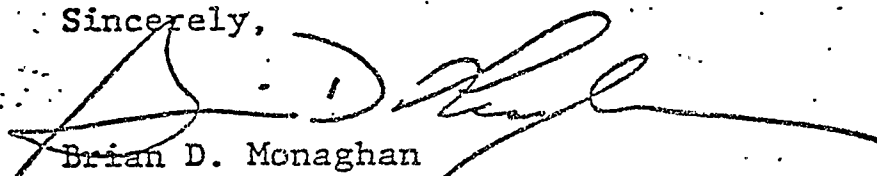
Re: Judith (Campbell) Exner

Gentlemen:

By letter dated December 24, 1975, I requested access to any and all files or records under the name or names of Judith Katherine Eileen (nee Immoor) (Campbell) Exner, pursuant to the Freedom of Information Act, 5 U.S.C. 552. Ten working days having elapsed, I deem my request denied and hereby appeal that denial. For your convenience I have enclosed a copy of my request letter.

If you do not act upon my appeal within twenty (20) working days, I will deem my request denied.

Sincerely,


Brian D. Monaghan

BDM:maw

Enclosure

cc: Ms. Judith (Campbell) Exner

EXHIBIT "2"

JAN 18 1976



UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

WASHINGTON, D.C. 20535

January 15, 1976

Brian D. Monaghan, Esq.
Suite 1324
Security Pacific Plaza
1200 Third Avenue
San Diego, California 92101

Dear Mr. Monaghan:

This is to acknowledge receipt of your Freedom of Information-Privacy Acts (FOIPA) request on behalf of your client, Judith Katherine Eileen Exner, by the FBI on December 30, 1975.

An exceedingly heavy volume of FOIPA requests has been received these past few months. Additionally, court deadlines involving certain historical cases of considerable scope have been imposed upon the FBI. Despite successive expansions of our staff responsible for FOIPA matters, substantial delays in processing requests continue.

The FBI has 5,964 FOIPA requests on hand. Processing has begun, and is in various stages of completion on 991 of those cases. In an effort to deal fairly with any request requiring the retrieval, processing and duplication of documents, each request is being handled in chronological order based on the date of receipt. Please be assured that your request is being handled as equitably as possible and that all documents which can be released will be made available at the earliest possible date.

Your patience and cooperation will be appreciated.

Sincerely yours,

Clarence M. Kelley
Clarence M. Kelley
Director

EXHIBIT "3"

FEB 5 1976

Brian D. Monaghan, Esquire
Attorney at Law
Security Pacific Plaza
1200 Third Avenue, Suite 1324
San Diego, California 92101

Dear Brian:

This is in response to your letter of January 26, 1976, in which you set forth a list of reasons why you believe that the pending request and appeal of your client, Judith Campbell Exner, should be given priority of handing over the several thousand previous requests still pending in the F.B.I.

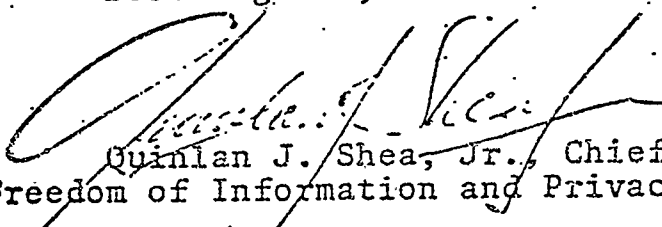
I am sending a copy of your letter and my reply to Director Kelley for his consideration. In my personal view, however, the case for preferential treatment is unpersuasive. Although I understand your point of view, I do not accept the parallel between Ms. Exner's case and that of Sam Giancana. As stated by you, I find the argument that Ms. Exner is in physical danger to be really nothing more than that -- an argument. As to historical significance, this claim can also be made, at least as validly, on behalf of many of the other requesters who are patiently awaiting their respective turns in line. Although it is true that many requests to the F.B.I. have been of a frivolous nature, many others have not. It is unfortunate, but equally true, that the Freedom of Information and Privacy Acts provide no valid basis for distinguishing between sincere and well-intentioned requesters and those who are simply seeking to harass the F.B.I. To sum it all up, I perceive a situation in which the requester has a strong desire to obtain her file as quickly as possible -- a desire she shares with literally thousands of other persons

I do not, however, see a situation in which the need of your client for preferential handling is so clear that I would be justified in intruding upon the internal processes of the F.B.I. in this matter, even though it is my present understanding that the Bureau does not intend to give Ms. Exner any preference.

I thoroughly enjoyed our recent telephone conversation and wish that my response could be in accord with your desires. My basic sense of fairness, however, leads me to the conclusion that Ms. Exner should wait her turn -- a conclusion that I consider to be fully consistent with what I consider to be the basic intent of Congress in this area.

You may, if you choose to do so, elect to treat this letter as a denial of your administrative appeal by the Deputy Attorney General and seek relief in the courts. Your client has the right to sue in the judicial district in which she resides, or in which she has her principal place of business, or in the District of Columbia, which is also where the records she seeks -- if, indeed, they exist at all -- are located.

Best regards,


Quinlan J. Shea, Jr., Chief
Freedom of Information and Privacy Unit

ACKNOWLEDGMENT OF SERVICE

Receipt of a copy of the Amended Complaint for Injunctive Relief Under the Privacy Act of 1974 and the Freedom of Information Act is hereby acknowledged this 19th day of February, 1976.

Pat W. Boman

Hand delivered by Mr. Leonard

1 BRIAN D. MONAGHAN, ESQ.
2 1324 Security Pacific Plaza
3 1200 Third Avenue
4 San Diego, California 92101
5 (714) 232-6254

6 Attorney for Plaintiff

FILED

FEB 6 - 1976

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

8 UNITED STATES DISTRICT COURT
9 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

10
11 JUDITH KATHERINE EXNER,
12 Plaintiff,

13 vs.

14 FEDERAL BUREAU OF INVES-
15 TIGATION,

16 CLARENCE M. KELLEY, Director,
17 Federal Bureau of Investi-
18 gation
19 10th Street and Pennsylvania
20 Avenue, N.W.
21 Washington, D.C. 20535

22 UNITED STATES DEPARTMENT OF
23 JUSTICE, and

24 EDWARD H. LEVI, Attorney
25 General of the United States
26 Department of Justice Building
27 10th Street and Pennsylvania
28 Avenue, N.W.
29 Washington, D. C. 20530,

30 Defendants.

CIVIL ACTION NO. 76-89-S

31 COMPLAINT FOR INJUNCTIVE RELIEF

32 1. This is an action under the Freedom of Information
Act, 5 U.S.C. §552, as amended by Pub. L. No. 93-504, 88 Stat.
1561, to require defendants to permit access to certain records in
their possession.

2. This Court has jurisdiction over this action pursuant
to 5 U.S.C. §552(a)(4)(B).

1 -----

2 -----

3 3. Plaintiff, JUDITH KATHERINE FILEEN (nee IMMOOR)
4 (CAMPBELL) EXNER is a resident of San Diego County, California.

5 4. Defendant Federal Bureau of Investigation is an
6 agency of the United States and has possession of the records to
7 which plaintiff seeks access.

8 5. Defendant Clarence M. Kelley is the Director of the
9 Federal Bureau of Investigation and initially denied plaintiff's
10 request.

11 6. Defendant Department of Justice is an agency of the
12 United States and is responsible, under its regulations, for re-
13 viewing appeals from denials by the FBI of requests for records.

14 7. Defendant Edward H. Levi is the Attorney General of
15 the United States; the Department of Justice made the final denial
16 of plaintiff's request on February 5, 1976.

17 8. By letter dated December 24, 1975 (a copy of which
18 is attached as Exhibit "A"), plaintiff requested access to all
19 records in the possession of the FBI pertaining to plaintiff.

20 9. By failing to produce or make available said records
21 within the statutory period, Defendant FBI denied plaintiff's re-
22 quest.

23 10. By letter dated November 11, 1976 (a copy of which is
24 attached as Exhibit "B", plaintiff appealed the initial denial.

25 11. By letter dated January 26, 1976^(exhibit C)//plaintiff request-
26 ed preference and specified the justification for such preference.

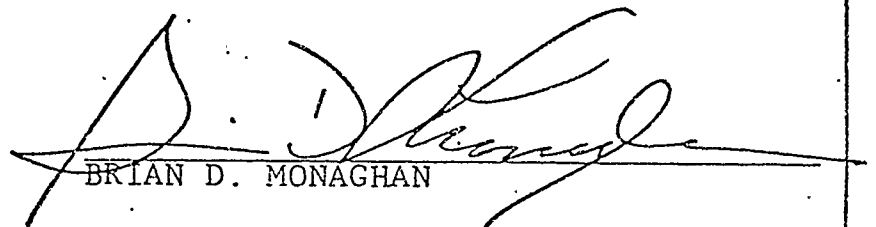
27 12. By letter dated February 5, 1976 (a copy of which
28 is attached as Exhibit "D", Quinlan J. Shea, Chief, Freedom of In-
29 formation Appeals Unit, Office of the Deputy Attorney General,
30 denied said appeal.

31 13. Pursuant to 5 U.S.C. §552(a)(3), plaintiff is en-
32 titled to access to the requested records, and there is no legal

1 -----
2 -----
3 basis for defendants' denial of such access, nor has any such
4 basis for denial been raised by defendants in response to plaintiff's
5 request and appeal.

6 WHEREFORE, plaintiff prays that the Court (1) order
7 defendants to permit access to the requested records; (2) provide
8 for expeditious proceedings in this action as provided in 5 U.S.C.
9 §552(a)(4)(D); (3) award plaintiff her costs and reasonable
10 attorneys' fees in this action; and (4) grant such other and
11 further relief as the Court may deem just and proper.

12 DATED: San Diego, California
13 February 6, 1975

14
15 
16 BRIAN D. MONAGHAN

17 Suite 1324 - Security Pacific Plaza
18 1200 Third Avenue
19 San Diego, California 92101
20 (714) 232-6254

21 Counsel for Plaintiff
22
23
24
25
26
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29
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31
32

UNITED STATES GOVERNMENT

Memorandum

TO :

DATE: 3/2/76

FROM : Legal Counsel *[Signature]*

SUBJECT: SUBPOENA OF AMERICAN TELEPHONE AND
TELEGRAPH COMPANY RECORDS RELATING
TO NATIONAL SECURITY MATTERS

Assoc. Dir. _____
Dep. AD Adm. _____
Dep. AD Inv. _____
Asst. Dir.: _____
Admin. _____
Comp. Syst. _____
Ext. Affairs *b6* _____
Files & Com. *b7C* _____
Gen. Inv. _____
Ident. _____
Inspection _____
Intell. _____
Laboratory _____
Legal Coun. _____
Plan. & Eval. _____
Spec. Inv. _____
Training _____
Telephone Rm. _____
Director Sec'y _____

On February 12, 1976, Mr. William Caming, Attorney for American Telephone and Telegraph Company (AT & T), appeared before the Privacy Protection Study Commission. Congressman Edward Koch (New York), serves as a member of the Privacy Protection Study Commission. The mandate of the Commission as provided for under the Privacy Act of 1974, is to examine the private sector as well as State and local governments to ascertain what provisions of the Federal Privacy Law governing the collection of material by the United States Government and its agencies should be extended to those other sectors.

Congressman Koch questioned Mr. Caming regarding requests from the FBI to AT & T for toll billing records. Congressman Koch took exception to the fact that when the Director of the FBI requested records, without subpoena, related to national security, the subscriber would not be notified by AT & T. Congressman Koch asked Mr. Caming for the total number of subpoenas and other judicial process served upon him, which had a no disclosure provision for the period March 1, 1974, to date.

Mr. Caming advised the Legal Counsel Division on February 25, 1976, that he foresaw no problem in submitting that updated figure because it had been submitted previously, with Bureau concurrence, in a lawsuit against AT & T by the Reporters Committee for Freedom of the Press. He expected to receive a subpoena to furnish the figure within the next week or two and added that the figure would not be furnished without a subpoena.

- 1 -
- 1 - Mr. Mintz
- 1 -
- 1 -
- 1 -

62-116929-

18 1976

21 MAR 16 1976

JOS:clh
(7) *clh*



61 MAR 24 1976

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

b6
b7C

Original in 62-116929-14

Legal Counsel to Mr. Adams
RE: SUBPOENA OF AMERICAN TELEPHONE
AND TELEGRAPH COMPANY RECORDS RELATING
TO NATIONAL SECURITY MATTERS

Regarding the above mentioned lawsuit, it is noted that by November 26, 1975, memorandum from the Director to the Assistant Attorney General, Civil Division, captioned, "Reporters' Committee For Freedom Of The Press, et al., v. American Telephone And Telegraph Company, et al. (U.S.D.C., D.D.C.)", Civil Action No. 74-1889," the Bureau responding to interrogatories, advised the Department of Justice that in approximately 133 instances, during the period March 1, 1974, through June 30, 1975, the FBI requested in writing from AT & T that the telephone records be provided without a subpoena, pursuant to a national security investigation. On December 4, 1975, that figure was furnished to the parties to the lawsuit.

Plaintiffs in the lawsuit, including columnist Jack Anderson and others, seek to require at least five days notice to telephone subscribers in the news media from defendant telephone companies before those companies comply with any subpoena or demand of lawful authority for telephone toll records of plaintiffs and members of the news media. Plaintiffs claim this would aid in protecting their confidential news sources. Because of the obvious interest, the United States has intervened in the suit and is now a defendant.

RECOMMENDATION:

For information.

[Handwritten initials: H, B, J, and others]

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

United States Department of Justice

TELEPHONE:
(714) 293-5610

UNITED STATES ATTORNEY

SOUTHERN DISTRICT OF CALIFORNIA
UNITED STATES COURTHOUSE
325 WEST F STREET
SAN DIEGO 92101

JRN:pb

March 16, 1976

F.B.I.

b6
b7c

Department of Justice
Washington, D. C. 20530

Attention: Chief
Information & Privacy Act Unit

Judith Campbell

Re: Exner v. FBI, et al.
Civil No. 76-0089-S
DJ Ref: 145-12-2683

Gentlemen:

On March 16, 1976, at 10:30 a.m., I appeared in District Court in opposition to plaintiff's motion for a partial summary judgment. The court found that a summary judgment was not proper and that the plaintiff would have to wait sixty days for the government's response.

The court did, however, state that the Freedom of Information Act and the Privacy Act mandated that these matters be expedited. Therefore, he ordered that when the United States files its response that it should identify the file or files and their bulk, and whether the government will claim that any portion of the file or files are exempt.

I indicated to the court that the FBI was greatly backlogged due to the number of requests that have been forwarded to it by persons seeking to examine their files, if any. I also indicated that if we could not comply with the type of response ordered by the court we would bring a motion for an extension of time supported by affidavits or memorandum underscoring the government's problem. The court hinted very broadly that the government would have to make a substantial showing before he would consider changing his order.

ENCLOSURE

REC-10

62-116929-5

MAR 24 1976



54 OCT 13 1976

Hand Delivered
by

3/24/76 Ekn

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b7c

Department of Justice

- 2 -

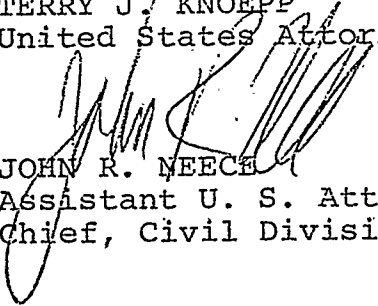
March 16, 1976.

I have not received a copy of the order as yet, but wish to bring this matter to you as soon as possible as our answer date is April 10, 1976, and I do not believe we should wait until that date before we make a motion to enlarge the time to plead.

If you have any further questions, please contact me.

Very truly yours,

TERRY J. KNOEPP
United States Attorney



JOHN R. NEECE
Assistant U. S. Attorney
Chief, Civil Division

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,

CIVIL NO. 76-0089-S

Plaintiff

v.

AFFIDAVIT OF SERVICE

FEDERAL BUREAU OF INVESTIGATION,
et al.

BY MAIL

Defendants

STATE OF CALIFORNIA)

) ss.

COUNTY OF SAN DIEGO)

Phyllis H. Bauerlein, being first duly sworn,
deposes and says:

That she is a citizen of the United States and a
resident of San Diego County, California; that her business
address is 325 West F Street, San Diego, California; that she
is over the age of eighteen years, and is not a party to the
above-entitled action;

That on March 3, 1976, she deposited in the
United States mail at San Diego, California, in the above-
entitled action, in an envelope bearing the requisite postage,
a copy of OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL

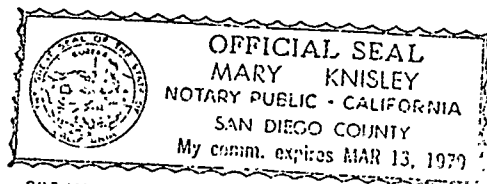
SUMMARY JUDGMENT

addressed to Richard C. Leonard, 2404 Wilshire Blvd., Suite 400
Los Angeles, CA 90057

his/~~their~~ last known address, at which place there is delivery
service of mail from the United States Post Office.

SUBSCRIBED AND SWORN TO before me
this 3rd day of March, 1976.

Mary Knisley
Notary Public in and for said County
and State



1 TERRY J. KNOEPP
2 United States Attorney
3 JOHN R. NEECE
4 Assistant U. S. Attorney
5 Chief, Civil Division
6 United States Courthouse, Annex A
7 325 West F Street
8 San Diego, California 92101
9 Telephone: (714) 293-5659
10
11 Attorneys for Defendants.

12 UNITED STATES DISTRICT COURT
13 SOUTHERN DISTRICT OF CALIFORNIA

14 JUDITH KATHERINE EXNER,
15 Plaintiff,
16 v.
17 FEDERAL BUREAU OF INVESTIGATION,
18 et al.,
19 Defendants.

Civil No. 76-0089-S

OPPOSITION TO PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT

20 Plaintiff filed her amended complaint on February 19,
21 1976, naming the Federal Bureau of Investigation, Clarence M.
22 Kelly as director of Federal Bureau of Investigation, the United
23 States Department of Justice, and Edward H. Levi, as Attorney
24 General of the United States as party defendants. She bases
25 jurisdiction under the provisions of 5 U.S.C. §552(a)(4)(B)
26 (Freedom of Information Act), and 5 U.S.C. §552a(g)(1) (The
27 Privacy Act of 1974).

28 Plaintiff's complaint, in summary, indicates that in
29 September, 1975, she appeared before the Senate Select Committee
30 to Study Governmental Operations with Respect to Intelligence
31 Activities and in the course of her testimony she became aware
32 that there was some type of file or record compiled upon her
past activity relating to her relationship with President
John F. Kennedy. The Committee inferred that such records had

JRN:pb
3-3-76

FILED
MAR 3 - 1976
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY

FORWARDED TO

Fed. Bureau of Invest.

FOR
Information & File

DEPARTMENT OF JUSTICE
Civil Division

3/17/76
(DATE)

pad
(INITIALS)

1 been compiled or maintained by the FBI.

2 Plaintiff further alleges that by the nature of the
3 questions asked by the Committee she has reason to believe
4 that much of the information contained in the alleged files
5 or records is inaccurate and in an effort to gain access to the
6 files or records and correct the inaccuracies she has made
7 requests to the FBI under both the Freedom of Information Act
8 and the Privacy Act by letter dated December 24, 1975 (Plaintiff's
9 Exhibit 1) and by letter dated January 11, 1976 (Plaintiff's
10 Exhibit 2). The government, in reply, in a letter dated January
11 15, 1976, notified her attorney that due to the heavy volume of
12 Freedom of Information and Privacy Act requests they could not
13 immediately comply with her demand. Subsequently, it appears
14 that Mr. Shea of the Freedom of Information Unit in the Department
15 of Justice conversed by telephone with plaintiff's attorney prior
16 to February 5, 1976, which prompted a letter of that date from
17 Mr. Shea to plaintiff's attorney (Plaintiff's Exhibit 4) in which
18 Mr. Shea indicated that they could not take Mrs. Exner's request
19 out of turn and she would have to wait in line. Plaintiff, treat-
20 ing Mr. Shea's letter as a denial, brought the instant suit.

21 On February 25, 1976, the plaintiff moved for summary
22 justment which in essence asked that the court accelerate the
23 litigation by entering a summary judgment which would provide
24 her with the entire relief prayed for in the complaint. The
25 reason for such abbreviated relief as stated by plaintiff, was
26 that (1) her integrity and the integrity of the Senate Select
27 Committee was at state, and (2) she feared for her personal
28 safety. The latter claim is supported by the vague references
29 to threatening telephone calls and to an elusive analogy drawing
30 a connection between herself and the recently murdered Mafia
31 figure, Sam Giancana. While her effort on the behalf of the
32 Senate Subcommittee is commendable and the fear for her personal

1 safety distressing, they appear to be somewhat peripheral
2 considerations considering that the real reason for her haste
3 is her desire to meet a publisher's deadline on her book in which
4 her experiences with President Kennedy are apparently regaled.
5 This latter reason was candidly admitted in court but somewhat
6 less than candidly omitted in her pleadings.

7 POINTS AND AUTHORITIES

8 Freedom of Information Act, 5 U.S.C. §552(a)(4)(C)
9 specifically provides that the government has thirty days to
10 respond to a complaint filed under that Act. The Privacy Act,
11 5 U.S.C. §552a, does not provide for any abbreviated response.
12 Therefore, Rule 12a giving the government sixty days must apply.

13 There is no question that in both the Freedom of
14 Information Act and the Privacy Act the Congressional purpose
15 was to reduce the time necessary to exhaust administrative
16 remedies and encourage a speedy joinder of issues under judicial
17 review. However, the Acts do not envision any extraordinary
18 summary procedure surplanting the regular course of litigation.
19 This principle was outlined in the case of Martin v. Neuschel,
20 396 F.2d 739 (3d Cir. 1968) where the court stated:

21 . . . the government and its officers,
22 as well as private citizens, are entitled to
23 due and regular process in the pleading,
24 hearing, consideration and disposition of
25 litigated claims. The fact that a court
26 doubts that a public officer can justify
27 acts complained of does not warrant a
28 denial of the right to plead whatever
29 defense he may and to have the merits of the
30 controversy decided in regular course.

31 Similarly, in Theriault v. United States, 503 F.2d 390
32 (9th Cir. 1974) the court reversed a district court in a Freedom

1 of Information Act complaint where the court entered a pretrial
2 discovery order which in essence provided the plaintiff with all
3 the relief asked for under the Freedom of Information Act,
4 stating:

5 . . . The practical effect of the full
6 force of that order is a granting of the full,
7 complete and final relief available to a
8 complaint under the Act.. . . (503 F.2d 391
9 at 390, 391)

10 . . . Accordingly, the September order
11 cannot stand as the ultimate grant of the
12 relief sought under the Act and must be
13 vacated. (503 F.2d 390, 392)

14 While plaintiff couches her motion under Rule 56, she
15 is essentially asking the court to enter a preliminary injunction
16 under Rule 65 which, if granted, would provide the plaintiff with
17 all the injunctive relief she could obtain under the provisions
18 of both the Privacy and Freedom of Information Act.

19 This result can not be read into these Acts nor is the
20 result sought sanctioned by Rule 65. This was clearly pointed
21 out in Tanner Motor Livery, Ltd. v. Avis, Inc., 316 F.2d 804
22 (9th Cir. 1963) where the court held:

23 . . . It is so well settled as not to
24 require citation of authority that the usual
25 function of a preliminary injunction is to
26 preserve the status quo ante litem pending
27 a determination of the action on the merits.
28 The hearing is not to be transformed into a
29 trial of the merits of the action upon
30 affidavits, and it is not usually proper
31 to grant the moving party the full relief
32 to which he might be entitled if successful

1 at the conclusion of a trial. This
2 is particularly true where the relief
3 afforded, rather than preserving the
4 status quo, completely changes it. Yet
5 this is what Judge Clarke's order does,
6 and it is based upon findings that purport
7 to determine that Tanner breached the
8 contracts, that its breaches could not
9 be cured, and that Tanner has no substantial
10 defense to the action. These are matters
11 to be determined at trial, not upon the
12 motion for preliminary injunction.

13 (316 F.2d 804, 808) See, also, Ignatius,
14 383 F.Supp. 58 (S.D. N.Y. 1968)

15 Plaintiff additionally seeks an order directing an
16 in camera inspection of the alleged documents. While in camera
17 inspections may be undertaken by the court pursuant to
18 5 U.S.C. §552(a)(4)(B) and pursuant to 5 U.S.C. §552(a)(g)(A),
19 this does not however mean that the government should not be
20 given an opportunity to prevail on the basis of detailed
21 affidavits or evidence. This precise point was raised in
22 E.P.A. v. Mink, 410 U.S. 73 (1973) where the court, in reversing
23 the District of Columbia Circuit stated:

24 . . . Plainly, in some situations, in camera
25 inspection will be necessary and appropriate.
26 But it need not be automatic. An agency
27 should be given the opportunity, by means
28 of detailed affidavits or oral testimony,
29 to establish to the satisfaction of the
30 District Court that the documents sought
31 fall clearly beyond the range of material
32 that would be available to a private party

1 in litigation with the agency. The
2 burden is, of course, on the agency
3 resisting disclosure, 5 U.S.C. §552(a)(3),
4 and if it fails to meet its burden without
5 in camera inspection, the District Court
6 may order such inspection. But the agency
7 may demonstrate, by surrounding circumstances,
8 that particular documents are purely advisory
9 and contain no separable, factual information.
10 (410 U. S. 73, 93)

11 The 1974 amendments to the FOIA also emphasize this point.
12 For instance, the Conference Report on the 1974 amendment states
13 that "before the court orders in camera inspection, the government
14 should be given the opportunity to establish by means of
15 testimony or detailed affidavits that the documents are clearly
16 exempt from disclosure." 93 Congress 2d Session, Senate Report
17 No. 93-1200, page 9 (Conference Report).

18 As outlined in the letter to plaintiff (Exhibit 2 of
19 Plaintiff's Complaint) the FBI is currently approximately 6000
20 requests backlogged and the government intends to seek a
21 stay pursuant to 5 U.S.C. §552(a)(6)(C) which will state that
22 exceptional circumstances exist and the agency is exercising due
23 diligence in responding.

24 It is essential that the agency proceed to process these
25 requests in an orderly, methodical fashion, and in addition be
26 fair to all requestors, each person must be treated alike and
27 wait in turn. Plaintiff's need for the material for her book
28 should not distinguish her case different from the rights of any
29 other person seeking information under the Act.

30 //

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CONCLUSION

For the foregoing reasons plaintiff's motions must
be denied.

DATED: March 3, 1976.

TERRY J. KNOEPP
United States Attorney

JOHN R. NEECE
Assistant U. S. Attorney
Chief, Civil Division

United States Attorney
San Diego, California

March 11, 1976

Re: L. Lee
Assistant Attorney General
Civil Division

TEL: 321-100
145-12-2663

By: Jeffrey Inelrad, Chief
Information and Privacy Unit

Tel: 739-3300

Judith Katherine Grier v. Federal Bureau of
Investigation, et al., U.S.D.C. S.D. Cal.,
Civil No. 76-0039-S.

Attention: Mr. John L. Decco
Assistant United States Attorney

We have consulted with the FBI and suggest that you file an answer along the lines set forth below. Please send us copies of the answer which you file and keep us informed of developments in this matter. We look forward to receipt of the brief which you recently filed, as we discussed on the telephone, and will further advise you with regard to the litigation. We intend to forward papers to you which should support a motion for stay, pursuant to 2 U.S.C. 352(a)(3)(C). Of course, the answer outlined below should not be filed until our time to respond to the complaint runs.

ANSWER

Defendants, by their undersigned attorneys, for their answer admit, deny, and aver as follows:

FIRST DEFENSE

Defendants Federal Bureau of Investigation, Clarence A. Kelley and Edward E. Levi are not proper parties to the action.

SECOND DEFENSE

The action should be stayed since exceptional circumstances exist and the Department of Justice is exercising due diligence in responding to plaintiff's request for records.

In answer to the numbered paragraphs of the amended complaint, defendants admit, deny, and aver as follows:

EXP. PROC.
34 MAR 15 1976

120-116929-6

20 MAR 12 1976

Madh...

1. Deny as conclusions of law.
2. Deny except to admit that plaintiff has requested records from the Federal Bureau of Investigation.
3. Deny except to admit that the Department of Justice is an agency of the United States, the FBI is a component of the Department of Justice, defendant Kelley is the Director of the FBI, defendant Levi is the Attorney General of the United States, and aver that the FBI will process plaintiff's request for records in due course.
4. Deny except to admit the authenticity of Exhibit 1 to the amended complaint, to which the Court is respectfully referred for a true and complete statement of its contents.
5. Deny except defendants admit the authenticity of Exhibit 2 to the complaint and respectfully refers the Court to Exhibit 2 thereof for a full and complete statement of its contents.
6. Deny except to admit the authenticity of Exhibit 3 of the complaint and respectfully refer the Court to Exhibit 3 of the complaint for a full and complete statement of its contents.
7. Deny except to admit the authenticity of Exhibit 4 of the complaint and respectfully refer the Court to Exhibit 4 to the complaint for a full and complete statement of its contents.
8. Deny for lack of knowledge or information sufficient to form a belief except to refer the Court to the testimony and report of the Senate Select Committee referred to in Paragraph 7 of the complaint for the contents thereof.
9. Deny for lack of knowledge or information sufficient to form a belief.
10. Deny except to respectfully refer the Court to the Privacy Act of 1974, Public Law 93-579, 5 U.S.C. 552a, for the provisions thereof.
11. Deny as conclusions of law except to respectfully refer the Court to the Privacy Act of 1974, 5 U.S.C. 552a and to the Freedom of Information Act, 5 U.S.C. 552, for the provisions thereof.

12. Deny.

Defendants deny each and every allegation of the complaint not expressly admitted or qualified above.

Defendants deny that plaintiff is entitled to the relief prayed for in the complaint or to any relief whatsoever.

WHEREFORE, defendants pray that the action be dismissed with prejudice and that defendants be granted their costs.

Inclosure

✓ cc: Mr. Clarence M. Felley
Director Federal Bureau of Investigation

Attention: Legal Counsel

62-116929-7

CHANGED TO

62-116977-2

c/vh

7/27/76

2

UNITED STATES GOVERNMENT

Memorandum

TO : [REDACTED]

FROM : Legal Counsel *[Signature]*

SUBJECT: JUDITH CAMPBELL EXNER
v. FEDERAL BUREAU OF INVESTIGATION
(U.S.D.C., S.D. CALIFORNIA)
CIVIL ACTION NO. 76-0089-S

DATE: 3/31/76

Assoc. Dir. _____
Dep. AD Adm. _____
Dep. AD Inv. _____
Asst. Dir.:
Admin. _____
Comp. Syst. _____
Ext. Affairs *b6*
Files & Com. *b7C*
Gen. Inv. _____
Ident. _____
Inspection _____
Intell. _____
Laboratory _____
Legal Coun. *[Signature]*
Plan. & Eval. _____
Spec. Inv. _____
Training _____
Telephone Rm. _____
Director Sec'y _____

The purpose of this memorandum is to recommend that attached affidavit of Special Agent [REDACTED] Records Management Division, FOI-PA Section, be approved. *3* *b6* *b7C*

DETAILS:

By memorandum to [REDACTED] from Legal Counsel, dated 2/13/73, you were advised that captioned plaintiff was identified during the inquiries by the Senate Select Committee on Intelligence Activities as a close associate of John F. Kennedy while he was President of the United States and at the same time she was an associate of members of organized crime. Pursuant to the FOIA, she requested access to any and all files or records concerning her held by the FBI. She requested expeditious handling of the FOIA request which was denied by Quinlan Shea, Chief of the Freedom of Information and Privacy Unit in the Department. She now claims the failure to respond to her FOIA request in a timely fashion entitles her to sue for the materials requested. *b6* *b7C*

Attached affidavit is to be submitted to the court in order to request a stay in proceedings pending review of documents.

Enclosure

EX-115

REC-61

62-116929-8

- 1 - [REDACTED]
Attn: [REDACTED]
1 - Mr. Mintz
1 - FOIA Litigation Unit
[REDACTED]

EPM:rme

(4)

(CONTINUED - OVER)

b6
b7C

Memorandum to
Re: Judith Campbell Exner v. Federal Bureau of Investigation
(U.S.D.C., S.D. CALIFORNIA), Civil Action No. 76-0089-S

b6
b7C

RECOMMENDATION:

That upon approval, original and five copies
of attached affidavit will be hand-delivered to Departmental
Attorney Jeffrey Axelrad, by 3/31/76.

for JBM

duD/alme

JBA
PM

1 UNITED STATES DISTRICT COURT
2 FOR THE SOUTHERN DISTRICT
3 OF CALIFORNIA

4 JUDITH KATHERINE EXNER,

5 Plaintiff,

6 v.

Civil No. 76-89-SA

7 FEDERAL BUREAU OF
8 INVESTIGATION, et al.,

9 Defendants.

10 AFFIDAVIT

11 I, Michael L. Hanigan, being duly sworn, depose as
12 follows:

13 (1) I am a Special Agent of the Federal Bureau of
14 Investigation (FBI) assigned in a supervisory capacity to
15 the Freedom of Information - Privacy Acts (FOIPA) Section
16 of the FBI, Washington, D.C.

17 (2) Due to the nature of my official duties, I am
18 familiar with the procedures we follow in processing
19 requests for information in our files received pursuant to
20 Title 5, United States Code, Section 552, more commonly
21 known as the Freedom of Information Act (FOIA), and I am
22 personally familiar with these procedures as they apply
23 to our response to plaintiffs' FOIA request.

24 (3) By letter from her attorney to the Federal Bureau
25 of Investigation dated December 24, 1975, plaintiff re-
26 quested access to any and all records filed in the names
27 of Judith Katherine Eileen (nee Immoor) (Campbell) Exner. (A
28 true copy of this letter is attached hereto and made a
29 part hereof as Exhibit A).

30 (4) By letter dated January 11, 1976, an appeal of
31 this request was filed with Deputy Attorney General Tyler,

32 //

1 plaintiff having deemed her request denied by the lapse
2 of ten working days. (A true copy of this letter is attached
3 hereto and made a part hereof as Exhibit "B").

4 (5) Director Kelley acknowledged on January 15,
5 1976, that the FBI received the Freedom of Information -
6 Privacy Act request on December 30, 1975. He explained
7 that there were 5,964 FOIPA requests at the FBI and that
8 991 of the requests were in various stages of being pro-
9 cessed. Plaintiff was informed that each request was
10 being handled in chronological order based on the date
11 of receipt in an effort to deal fairly with all requests,
12 and assurance was given that the request of plaintiff
13 was being handled as equitably as possible. The Director
14 further stated that all documents which could be released
15 would be made available at the earliest possible date.
16 The backlog of requests was described to plaintiff as
17 having resulted from an exceedingly heavy volume of
18 requests and court imposed deadlines in historical cases
19 of considerable scope. Substantial delays were con-
20 tinuing despite expansions in staff. (A true copy of this
21 letter is attached hereto and made a part hereof as
22 Exhibit C).

23 (6) By letter dated January 26, 1976, from plaintiff's
24 attorney to Quinlan J. Shea, Chief of the Freedom of
25 Information Appeals Unit, plaintiff sought priority consid-
26 eration of the request because of fear of physical danger
27 to herself and on the ground that historical significance
28 would attach to the document she sought. (A true copy
29 of this letter is attached hereto and made a part hereof
30 as Exhibit D).

31 //

32 //

1 (7) By letter dated February 5, 1976, Chief Shea
2 notified plaintiff's attorney that the FOI Appeal's Unit was
3 forwarding the January 26, 1976, letter to Director Kelley
4 for his consideration. Shea further stated that plaintiff
5 did not state sufficient grounds in his view for processing
6 the request out of chronological order. Therefore, plaintiff
7 could regard her administrative appeal as denied and seek
8 relief in the courts. (A true copy of this letter is at-
9 tached hereto and made a part hereof as Exhibit E).

10 (8) By letter dated February 19, 1976, Director
11 Kelley reiterated that FOIPA requests are handled in
12 chronological order. Plaintiff was advised that if she
13 is in physical danger or has any evidence regarding
14 threats against her life, she should bring this information
15 to the attention of proper authorities. (A true copy of this
16 letter is attached hereto and made a part hereof as
17 Exhibit F).

18 (9) In further explanation of the FBI's response
19 to plaintiff's FOIA request, the court's attention is respect-
20 fully directed to the following facts detailing the impact
21 the FOIA, and in particular the 1974 amendments thereto,
22 have had on the FBI.

23 (10) In 1973, the FBI received an average of approx-
24 imately one FOIA request per day, an amount which could be
25 processed without undue burden. In 1974, the FBI averaged
26 over 37 requests per month. The amendments went into effect
27 in February of 1975, the Privacy Act went into effect in
28 September of 1975, and in that year we received 13,875
29 requests pursuant to these two acts, an increase of more

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1 than three thousand percent over the previous year. During
2 December, 1975, the month in which plaintiff submitted her
3 request, the FBI received 1,026 other requests as well.
4 In January and February, 1976, the FBI received in excess
5 of 2,500 new requests for access to its records. (See
6 letter of March 15, 1976, to Honorable Bella S. Abzug,
7 Chairwoman, Government Information and Individual Rights
8 Subcommittee, Committee on Government Operations, United
9 States House of Representatives from the Deputy Attorney
10 General Harold R. Tyler, Jr., transmitting the Report of
11 the Department of Justice to Congress on Freedom of Infor-
12 mation Act Operations during calendar ^{1/} year 1975, at page 1
13 of the letter; Exhibit G.)

14 (11) Although implementation of the Act has been
15 unfunded, the FBI has recognized and taken substantial
16 action in terms of allocation of manpower and other measures
17 to meet the tremendous administrative burdens imposed upon
18 it as a result of the numerous requests for information
19 from its files received under the FOIA and Privacy Act.
20 A special Unit, solely designated to handle FOIA requests,
21 became operational in October of 1973, at which time it
22 consisted of 8 employees, including 3 law-trained Special
23 Agents. This complement was doubled during 1974 to keep
24 pace with the increased volume of requests. During 1975
25 further periodic increases in the personnel complement
26 assigned solely to the processing of FOIA and/or Privacy
27

28 ^{1/} This report offers graphic documentation that the
29 experience of the FBI is not unique in the Department of
30 Justice.

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1 Act requests were made, by reassigning personnel from
2 other substantive duties. By the end of 1975, 161 employees
3 at FBI Headquarters (FBIHQ) were engaged solely in the
4 processing of such requests, including 23 law-trained
5 Special Agents. This did not include numerous employees
6 from other Divisions at FBIHQ who are required to devote
7 a substantial portion of their time, to the detriment of
8 their other duties, to assist in this effort. Through
9 additional increases this year, we now have nearly 190
10 employees assigned full-time at FBIHQ to the processing of
11 requests received pursuant to the FOIA and Privacy Acts.
12 ^{2/} The expense incurred by the FBI in terms of both money
13 and manpower has been enormous and I believe our overall
14 investigative responsibilities imposed by statute may suffer
15 as a result.

16 (12) Despite what we feel to be more than diligent
17 efforts to comply with all requests, including plaintiff's,
18 on an equitable basis, there have been unavoidable delays
19 arising from the sheer volume of requests received and as
20 a result of court orders requiring reassignment of sub-
21 stantial numbers of our personnel to process certain cases
22 on a deadline basis.

23
24 ^{2/} The FBI's actual cost for implementation of the FOIA
25 in Fiscal Year (FY) 1974 was \$160,000. In FY 1975, it
26 jumped to \$462,000. and for FY 1976, the FBI has estimated
the cost to be \$2,675,000. For FY 1977, the FBI has
estimated the cost of the FOIA to be the same \$2,675,000,
plus \$752,000. for the Privacy Act of 1974.

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1 (a) In Meeropol, et al. v. Levi, et al. (United
2 States District Court for the District of Columbia, Civil
3 Action No. 75-1121), the court issued an order on August 27,
4 1975, which required us to review, index and inventory, by
5 October 21, 1974, some 363 volumes (each of which averages
6 150-200 pages) of files, and by the same date locate, review,
7 index and inventory over 9,000 references, all of which
8 represent material in the FBI's possession considered rele-
9 vant to the Rosenberg espionage case. Additionally, all
10 of the above material which is not exempt pursuant to the
11 FOIA had to be made available to plaintiffs in that case
12 by November 17, 1975, accompanied by a detailed justification
13 for those portions of the above-described material which
14 were withheld pursuant to the FOIA. This single court
15 order forced us to assign approximately one half of all
16 our FOIPA personnel to the processing of the subject matter
17 of one FOIA request, while the remainder of the complement
18 attempted to process the thousands upon thousands of other
19 FOIA requests which had been received.

20 (b) In Weinstein v. Levi, et al. (United States
21 District Court for the District of Columbia, Civil Action
22 No. 2278-72), the court issued an order on October 20, 1975,

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1 which required us to furnish plaintiff an itemized in-
2 ventory, by December 1, 1975, of all documents he had
3 requested under the FOIA (essentially, all pertinent material
4 in our possession concerning the Rosenberg case, supra,
5 plus an additional 152 volumes of files pertaining to the
6 Alger Hiss perjury case) not previously furnished him,
7 setting forth a detailed justification with respect to any
8 documents Director Kelley withheld pursuant to the FOIA.
9 Additionally, the order required us to make available to
10 plaintiff, by December 15, 1975, all of the above-described
11 material which is not exempt from release pursuant to the
12 FOIA. An additional 32 volumes of files had to be re-
13 viewed in order to locate information plaintiff had requested.
14 Although the court issued an order on November 25, 1975,
15 extending the above-described deadlines until January 31,
16 1976, as well as limiting the inventory requirement to only
17 that material not being furnished plaintiff, this order
18 still required the FBI to assign a substantial portion of
19 its FOIPA personnel to the processing of the subject matter
20 of one request.

21 (c) In Fellner v. U.S. Department of Justice, (United
22 States District Court for the Western District of Wisconsin,
23 Civil Action No. 75-C-430), the court issued an order on
24 December 17, 1975, requiring the FBI to review an additional
25 4,000 pages per month of the voluminous material subject
26 to plaintiff's request. Because of this order we are once
27 again required to devote a substantial portion of our FOIPA
28 personnel to the processing of one request, to the detriment
29 of all others, including plaintiff's.

30 (13) The FBI is and has been making every reasonable,
31 and sometimes extraordinary, effort to comply with the un-
32 expected demands of the amended FOIA. In consideration of

1 the present and continuing increase in the workload of
2 the FBI in fulfillment of its Congressionally-mandated
3 investigative duties concerning violations of statutes
4 of the United States, and taking into account present
5 budgetary and personnel limitations, it has become an
6 overwhelming burden for the FBI to respond to FOIA requests
7 within the limited time frame envisaged. Of the 13,875
8 requests received in 1975, we were able to respond fully
9 to 7,699, and as of the end of that year, were processing
10 an additional 1,004. This left a backlog of 5,172 requests
11 which still required processing, preferably on the basis
12 of date received to ensure fairness to all requesters.
13 Meanwhile, in the first eleven weeks of this year, we have
14 received 2,740 additional requests, and they continue to
15 come in at a rate of nearly 50 per workday.

16 (14) The sheer enormity of our administrative burden
17 can be seen when it is realized what is involved in processing
18 each of the thousands upon thousands of requests we have
19 received:

20 (a) Upon receipt of each request, assuming the sub-
21 ject matter is reasonably identifiable, such as a named
22 individual or individuals, or a named organization or orga-
23 nizations, we initiate a search of our Central Indices,
24 the result of which will indicate whether we have any files
25 dealing with the subject matter of the request. In the
26 case wherein we locate no record of an investigation con-
27 cerning the subject matter of the inquiry, the requester
28 is so advised at this time. If our indices search indicates
29 that we do have files which may fall within the purview of
30 the request, the requester is advised and the case is
31 placed in chronological order until we are able to initiate
32 //

1 the actual processing. When the case is assigned for
2 processing, we locate these files and determine whether
3 the information therein is in fact identical to the subject
4 matter of the request (i.e., Is the John Doe in the file
5 the same as the John Doe who has requested information
6 concerning himself?) The mechanical task of processing
7 follows.

8 (b) The task of processing an FOIA request involves
9 first reproducing an entire section of the file, in order
10 to review and mark for deletions or exemptions, if any,
11 where appropriate. From this working copy, additional
12 copies are made - one for the requester and one for our
13 own administrative control. Review consists of a line-by-
14 line reading, with constant attention to matters which
15 involve, among other considerations, the privacy and
16 confidentiality of third parties, classified data, and
17 other information which is proscribed from release pursuant
18 to the FOIA or other statutes. Classified material must
19 be further reviewed by Special Agent personnel with ex-
20 pertise in the substantive area to which the particular
21 document pertains, who must determine if the document meets
22 the current classification criteria and which portion of
23 the document is actually the part subject to classification.
24 Thereafter, a determination will be made as to the release
25 of any non-classified portion of the document.

26 (c) This entire reviewing process is carried out
27 under the supervision of law-trained Special Agents, and
28 assuming we have located and processed material which falls
29 within the subject matter of the FOIA request, this material
30 is subject to several succeeding higher levels of exam-
31 ination and is finally furnished to the requester over
32 //

1 Director Kelley's signature. These examinations are made
2 for the purpose of assuring that no material to which the
3 requester is entitled is erroneously withheld and that no
4 material which should be withheld pursuant to the FOIA is
5 inadvertently released.

6 (d) The above-described procedure is followed with-
7 out exception in every FOIA request we receive. (Obviously,
8 however, this is not necessary in those cases wherein we
9 have no information concerning the subject matter of the
10 request.)

11 (15) Based on the FBI's experience to date in these
12 matters, due diligence requires that the only fair way
13 of ensuring that each request receives the legitimate
14 attention it deserves is to process these requests in
15 chronological order based on the date of their receipt,
16 and this is the policy we are presently following. The
17 FBI has been required to make exceptions to this policy
18 pursuant to the above-described court orders, but we
19 respectfully point out that a point may be reached, in the
20 not-too-distant future, when this would become a vicious
21 circle of self-defeating proportions. It is not incon-
22 ceivable that the FBI will soon reach the stage where all
23 FOIPA personnel are engaged solely in the processing of
24 requests pursuant to court-imposed deadlines, to the
25 detriment of the rights of all other requesters. This
26 could well cause other FOIA requesters who are now waiting
27 patiently, to institute legal actions, which in turn could
28 cause more court orders requiring immediate processing. In
29 view of the substantial allocations of personnel and finances

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1 already committed to FOIA and Privacy Act processing, given
2 the FBI's present budgetary and personnel limitations and,
3 most importantly other statutory responsibilities, additional.
4 court-imposed deadlines could place the FBI in the position
5 of expending so much manpower in attempting to comply with
6 a court order in one case, that it will be held in contempt
7 of a similar court order in a different case.

8 (16) The date when processing of plaintiff Exner's
9 request will begin is unfortunately contingent on a number
10 of unpredictable factors. The present rate of processing
11 may be further disrupted by receipt of additional court-
12 imposed deadlines requiring accelerated completion of the
13 processing of one request, (such as described at pages 5-8
14 supra) which would require reassignment of more personnel to
15 that request, thus delaying our responses to all others. In
16 addition, no prediction can be made of exactly how long it
17 will take to respond fully to those requests received prior
18 to plaintiff's, because it is impossible to know if each of
19 these requests will result in fairly rapid processing (because
20 the FBI does not possess an enormous amount of information
21 responsive to that particular request), or a massive pro-
22 cessing effort (because the FBI has thousands of pages of
23 material responsive to that particular request). Taking
24 into consideration these variables and based on our present
25 rate of processing (See paragraph 13, at page 7, supra),
26 the best estimate of the FBI at the present time, is that
27 the materials responsive to plaintiff's request will be
28 reviewed beginning approximately four months from now.
29 Since the volume of documents involved has not been ascer-
30 tained yet because the request has not been processed pre-
31 ferentially out of order, it is not possible to project how
32 long the review will take.

1 (17) Despite the difficulties described throughout
2 this affidavit, the FBI is continuing to do its utmost to
3 give fair and equitable treatment to all requestors. Every
4 effort will be made to commence processing plaintiff's
5 request within the time frame suggested. The FBI assures
6 plaintiff that if an improvement in conditions results
7 in an accelerated rate of processing, that benefit will
8 accrue to plaintiff as well as others awaiting a substan-
9 tive response.

10 Consistent with the provisions of the applicable
11 statutes, disclosure shall be forthcoming.

12
13 Michael L. Hanigan
14 Michael L. Hanigan
15 Special Agent
16 Federal Bureau of Investigation
17 Washington, D. C.

18 Subscribed and sworn to
19 before me this 31 day of
20 March, 1976.

21 Notary Public
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My commission expires 12/31/79

February 19, 1976

Brian D. Monaghan, Esq.
Security Pacific Plaza
Suite 1324
1200 Third Avenue
San Diego, California 92101

Dear Mr. Monaghan:

Your letter to Mr. Quinlan J. Shea, Chief, Freedom of Information Appeal Unit, Department of Justice, dated January 26, 1976, was forwarded to the FBI.

To assure fair and impartial treatment to all requests made under the Freedom of Information-Privacy Acts (FOIPA) the FBI handles such requests in chronological order based on date received. The statutes in question do not permit one individual's request for his or her file to be given priority over another's. Indeed, equitable treatment of all requesters is the very basis for not attempting to establish such priorities, but instead to handle each in chronological order.

As to the merits of whether any particular exemption(s) should be applied, it would be unwise for me to speculate prior to the examination of any relevant documents.

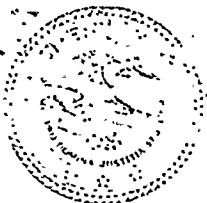
If your client believes she is in physical danger or has any evidence regarding threats against her life, I strongly urge you to bring this information to the attention of the proper authorities.

Sincerely yours,

Cl M. Kelley

Clarence M. Kelley
Director

62-116929-8
ENCLOSURE EXHIBIT F



THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

MAR 15 1976

Honorable Bella S. Abzug, Chairwoman
Government Information and Individual
Rights Subcommittee
Committee on Government Operations
Rayburn House Office Building, Room B-349-B-C
Washington, D. C. 20515

Dear Chairwoman Abzug:

This constitutes the Report of the Department of Justice to Congress covering Freedom of Information Act operations during calendar year 1975. At Tab A are the data required by the Act of every agency, in the format requested in your letter of July 1, 1975. At Tab B are the additional data required to be submitted by the Attorney General concerning cases arising under the Act and the efforts undertaken by the Department of Justice to encourage agency compliance with the Act throughout the Government.

In reviewing all of the data submitted herewith, I must state that much of it is disturbing to me and others interested and involved in F.O.I.A. matters. The receipt of over 30,000 requests for access, a number far in excess of what anyone had anticipated, has transformed this into a major area of Departmental operations. Over 120,000 man-hours are reported as having been expended, the majority by attorneys and supervisors, and these constitute only a partial accounting for the total personnel effort within the Department. These figures demonstrate the adverse impact on this Department's ability to carry out its traditional substantive missions during the past year. Moreover, the figures for the first two months of 1976 offer no indication that the tide is ebbing. Through March 5, for example, the Federal Bureau of Investigation has received in excess of 2,500 new requests for access to its records.

One of the provisions in the amendments to the Act that certainly has not worked out as anyone intended is the

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ENCLOSURE EXHIBIT G

imposition of very short time limits for the processing of requests. I fully understand and accept the desire of Congress to demonstrate the importance it attached to the reasonably expeditious processing of requests for access to records. In my opinion, however, any time limit that does not take into consideration the number and complexity of the records within the scope of the individual request is both unrealistic and wholly unworkable. Requesters have tended to word their requests as broadly as possible in an understandable effort to ensure that they encompass all records in which an individual has an interest. There is no effective mechanism under the Freedom of Information Act for requiring a requester to cooperate with the Department in an attempt to aid us in locating records of particular interest with a minimum expenditure of our personnel resources, although some requesters have done so willingly. Under these circumstances, once the flood of requests developed, it almost immediately became impossible to comply with the time limits in many of the components of the Department. The unfulfilled expectations of the requesters were then reflected in innumerable letters, telephone calls, complaints to Members of Congress, etc., responding to which served only to slow down even further the processing of the requests themselves. It is the large number of requests, however, encompassing thousands and tens of thousands of pages -- some, at least, among the most sensitive in the files of the Department -- that has tended, more than any other single factor, to slow down the processing of the far greater number of requests involving much smaller quantities of records. This entire area of time limits, viewed in the light of the total number of requests we have received and the significant fraction thereof involving large quantities of records, is one to which I hope your Subcommittee will give serious attention in the near future.

The results of our inability to comply with the letter of the Act as to time limits have been exacerbated by our efforts to comply fully with its spirit. At all times during my tenure as Deputy Attorney General, I have attempted to effect the maximum possible, responsible disclosure of records. It is clear that the Department of Justice is in fact releasing a considerable quantity of technically exempt material. My own view, as you know, is that an exemption is nothing more than a lawful excuse to withhold a record. I stress that access should not be denied unless some reason for doing so exists in terms of the present vital interests of the Department. My insistence on conformity with this policy, however, is an important factor contributing to the backlog within the

Appeals Unit. In addition to reviewing withheld materials to ascertain whether they are or are not exempt from mandatory release under the Act, its personnel must also review the exempt materials with a view towards a possible discretionary release, either by the component itself in the form of a supplemental release, or at my direction in the final action on the appeal. To be absolutely candid, it would be far easier for this Department to follow a practice of merely releasing that which is not exempt and withholding that which is. Certainly we could process our appeals more expeditiously. Revisions in the letter of the Act could have a great impact throughout the Executive Branch in terms of encouraging an attitude more favorably inclined towards releasing records, rather than seeking to withhold them.

There is one additional serious problem I desire to bring to your specific attention. That is the situation created by those cases in which we are sued before the administrative review process has been completed. Although the number of such cases is not particularly great, this unfortunate provision in the Act usually results in the individual who has sued receiving preferential consideration over the far greater number of other [usually prior] requesters and appellants who choose not to file suit, or who cannot do so. Congress has directed the courts, absent "exceptional circumstances" [5 U.S.C. 552(a)(6)(C)], to give these cases precedence on the docket and to expedite them "in every way." 5 U.S.C. 552 (a)(4)(D). Several cases in which courts have sought to carry out this Congressional intent have involved tremendous quantities of records; others have involved closely related, ongoing criminal investigations, so that the records have been not only voluminous, but also extremely sensitive. Over the objections of this Department, rigorous time schedules for the processing of the records in these cases have been imposed by the courts involved; to the principal detriment of the several thousand other requesters and hundreds of administrative appellants who must then wait even longer for action on their requests than would otherwise be the case. In my judgment, this result is grossly unfair in most instances. Absent some wholly arbitrary refusal to expedite a particular request or appeal when exceptional circumstances exist, each individual should be required to wait his or her turn in line. The law as presently written places the burden on the Government to prove that a case should not receive preferential, expedited treatment. This imbalance should be corrected, in fairness to other requesters and to eliminate an unnecessary contribution to the congestion of court dockets in the Federal Judicial System.

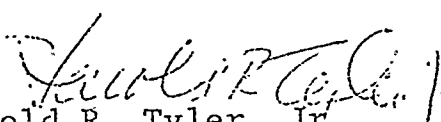
Within this Department, there have been instances in which individual cases were expedited administratively for cause. Such instances have been rare, however, which is as I believe it should be. No one anticipated the flood of requests and appeals following the effective date of the amendments to the Act. This Department's allocation of resources [currently, for example, approximately 175 in the F.B.I.'s Freedom of Information and Privacy Section -- including 25 Special Agents -- and 25 more in my own Appeals Unit] has been extremely generous. Relief could easily be granted in this area, with such issues as the allocation of resources and speed of processing being viewed as matters for Congressional, not Judicial, oversight. As it is now, we must take our personnel off cases on which they are already working, simply because some other individual or group with the inclination and resources to file suit refuses to wait in line. I strongly suggest that, in accordance with your letter of July 1, 1975, this provision of the Act should be considered by your Subcommittee for revision. As a minimum, the individual who chooses to file suit before the administrative process has been completed in his case should face a heavy burden of showing that truly exceptional circumstances exist that require expedited consideration of his request or administrative appeal and that the agency has refused to grant a specific request to do so.

There are, of course, many other problems, some of them quite serious, presented by the Act in its present form. I hope that these will also receive sympathetic consideration from your Subcommittee in the near future. Some of them would be at least partially resolved by a critical reexamination of the many substantive and procedural inconsistencies between the Freedom of Information Act and the access provisions of the Privacy Act of 1974. I would welcome the opportunity, both personally and through our respective staffs, to explore these matters with you more fully in the near future.

In conclusion, although I am not completely satisfied with the results we have achieved to date, it is my firm, overall judgment that the Department of Justice has performed well in this area during the past year under extremely arduous conditions. It remains my hope that cooperation between the Legislative and Executive Branches will result in the necessary and reasonable reformulation of the Act which would permit a substantial portion of the personnel now working in this area to return to the traditional substantive missions of the Department of Justice.

while continuing to meet the principal goals of the Freedom of Information Act.

Sincerely,


Harold R. Tyler, Jr.
Deputy Attorney General

UNITED STATES GOVERNMENT

Memorandum

TO :

DATE: 4/14/76

FROM : Legal Counsel *[Signature]*

SUBJECT: JUDITH KATHERINE EXNER v.
FBI, et al.
(U.S.D.C., S.D. CALIFORNIA)
CIVIL ACTION NO. 76-89-S

Assoc. Dir. _____
Dep. AD Adm. _____
Dep. AD Inv. _____
Asst. Dir.:
Admin. _____
Comp. Syst. _____
Ext. Affairs _____
Files & Com. _____
Gen. Inv. _____
Ident. _____
Inspection _____
Intell. _____
Laboratory _____
Legal Coun. _____
Plan. & Eval. _____
Spec. Inv. _____
Training _____
Telephone Rm. _____
Director Sec'y _____

PURPOSE:

This memorandum is to advise that affidavit executed, approved, and hand-carried to Departmental Attorney, reportedly lost after mailing by Department. Identical affidavit reexecuted and furnished Department for use in instant litigation.

SYNOPSIS:

Plaintiff is suing for FBI records under FOIA. Legal Counsel Division furnished Department with affidavit on 3/31/76, which has been reportedly lost in the mail. Identical affidavit executed.

RECOMMENDATION:

None. For information.

1 - EX-100

Attn:

1 - Mr. Mintz

V2210-1 FOIA Litigation

EPM:lsy

(4)

CONTINUED - OVER

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5010-108

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

LEGAL COUNSEL

Memorandum to [redacted]
Re: Judith Katherine Exner v.
FBI, et al.
(U.S.D.C., S.D. CALIFORNIA)
Civil Action No. 76-89-S

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DETAILS:

Plaintiff is suing for FBI records pursuant to her FOIA request submitted in December, 1975. Inasmuch as we have not processed the request, for to do so would give this request preferential treatment, the Department wished to move the Court on our behalf to stay the proceedings to allow sufficient time in order to process the request in chronological order. In support of this motion an affidavit executed by Special Agent [redacted], FOIPA Section, Records Management Division, and approved by memorandum of Legal Counsel to [redacted] dated 3/31/76, was hand-delivered to Departmental Attorney Lynne Zusman on that date.

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On 4/8/76 Zusman advised that she had forwarded the affidavit, together with motion papers, to the United States Attorney, Southern District of California, on 4/2/76 and further advised that he had not received these. She requested that the original affidavit be retyped and reexecuted for use in a hearing on the merits of this motion scheduled for 4/12/76. She stated that she had no explanation for the disappearance of the documents other than they were lost in the mail and that she was taking steps to trace these documents. On 4/9/76 an identical affidavit was reexecuted by Special Agent [redacted] for use of Department in support of the aforementioned motion, and hand-carried to Department on 4/9/76.

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APPROVED:

Assoc. Dir.....
Dep. AD Adm.....
Dep. AD Inv.....
Asst. Dir.: [signature]
Admin.....

Comp. Syst.....
Ext. Affairs.....
Gen. Inv.....
Ident.....
Inspection.....
Intell.....

Laboratory.....
Legal [signature]
Plan. & Eval.....
Rec. Mgmt.....
Spec. Inv.....
Training.....

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UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

REL;IJ;EEDavies;cva
145-12-2683

14 APR 1976

MEMORANDUM FOR THE SOLICITOR GENERAL

Re: Judith Katherine Exner v. Federal
Bureau of Investigation (USDC S.D.
Calif., Civil Action No. 76-0089-S)

TIME LIMITS

The district court denied a stay of judicial proceedings to permit the FBI and Deputy Attorney General's Office to complete review of the records in this FOIA/Privacy Act case on April 12, 1976. As a result of the denial, the defendants must now file a Vaughn v. Rosen (484 F. 2d 820, C.A.D.C., 1973), response by April 27, 1976, pursuant to an order earlier entered by the court in response to plaintiff's request for expeditious handling of her suit. An immediate stay must be obtained from the Ninth Circuit.

RECOMMENDATIONS

The FBI recommends appeal.

I recommend appeal.

QUESTION PRESENTED

Whether the district court's denial of a stay in this Freedom of Information Act/Privacy Act suit was contrary to the intent of Congress to permit government agencies to have additional time to review FOIA requests upon a showing of "exceptional circumstances" and "due diligence" 5 U.S.C. 552(a)(6)(C).

STATUTES INVOLVED

The Freedom of Information Act, 5 U.S.C. 552(a)(6)(C) provides:

Any person making request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have

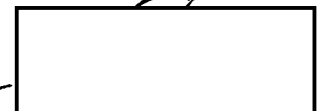
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exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

The Privacy Act, 5 U.S.C. 552a(g)(3)(A) provides:

In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

STATEMENT

On December 24, 1975, plaintiff Judith Katherine Exner made a request of the FBI for access to all records filed under her name. On January 11, 1976, before her request had been acknowledged, her counsel appealed to the Deputy Attorney General, noting that ten working days had elapsed and he considered the request denied. On January 15, 1976, the FBI Director acknowledged receipt of the request and advised plaintiff's counsel that the Bureau had 5,964 FOIPA (Freedom of Information/Privacy Act) requests on hand and her request would have to wait its turn. On January 26, 1976, plaintiff's counsel wrote Mr. Quinn Shea, Chief, Freedom of Information Appeals Unit, and asked that plaintiff's request be expedited because she "has been so prominent in the media lately that she is in physical danger until such time as all her recollections are committed to a writing", and because the document to be produced would be of "historical interest". Also, counsel added, "these files have been used against her and selected portions of them have been leaked to the press; it would only seem fair that she has a right to see them" (Defendants Exhibit D). Mr. Shea replied that he thought that the physical danger argument was "nothing more than that--an argument; and that he could see no basis for according plaintiff preferential treatment" (Defs. Exh. E). The FBI replied that it could not give plaintiff's request priority over other individual's request and "if your client believes she is in physical danger or has any evidence of threats against her life I urge you to bring this information to the attention of the proper authorities" (Defs. Exh. F).

Plaintiff then filed suit in the district court under the Privacy Act and the FOIA, requested access to her files, an opportunity to correct inaccuracies in those files, and copies of the files for her use. Specifically, she sought to enjoin the defendants from withholding records from her pursuant to the Privacy Act (5 U.S.C. 552a(g)(3)(A)) and to produce copies of the records pursuant to the FOIA (5 U.S.C. 552(a)(4)(B)) (Amended Complaint).

Plaintiff then moved to expedite the court proceedings, and to obtain prompt "in camera" inspections of her files (see Plaintiff's Ex Parte Motion). In an affidavit in support of the motion plaintiff stated her fears for her safety resulting from personal information about her being leaked to the press, which information linked her with former President Kennedy, Sam Giancana, Frank Sinatra and the Mafia. She claimed that much of this information was inaccurate and had led to distorted news accounts linking her with assassination attempts, and to threats against her life. The affidavit

stated:

Because of the murder of Sam Giancana, and because of threatening telephone calls I have recently received, I feel it is important that this information be recorded as quickly as possible.
[Affidavit, p. 11.]

The government opposed this motion and a motion by plaintiff for "partial summary judgment" (missing from files) on the ground that the preliminary relief sought would afford plaintiff essentially the entire relief sought in the Complaint. See Theriault v. United States, 503 F. 2d 390 (C.A. 9, 1974) denying discovery in an FOIA suit on this basis. We also stated that the real reason for plaintiff's haste was not her fears for her safety but her desire to meet a publisher's deadline in her forthcoming book (Opposition to Plaintiff's Motion For Partial Summary Judgment, p. 3).

The court did not order in camera inspection but did enter an order, following a hearing on plaintiff's motion, requiring the government to file by April 12, 1976, a statement containing the information described in Vaughn v. Rosen (484 F. 2d 820, 826-828, C.A.D.C., 1973). 1/ We filed an objection to the order (Objection to Proposed Order) and moved to stay further proceedings pursuant to the Freedom of Information Act, 5 U.S.C. 552(a)(6)(C), asserting that "exceptional circumstances" existed and that the government is exercising "due diligence" in responding to the request. In support of our motion we attached affidavits of Mr. Shea and F.B.I. Special Agent [redacted] indicating that the FBI and the appeals unit are processing FOIA requests as diligently as possible on a first-come first serve basis and have allocated substantial manpower to the review of records.2/

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1/ We were unaware that the order had been orally issued from the bench and treated the order as "prospective" until we learned otherwise at a hearing held on April 12, 1976, on our stay motion.

2/ These affidavits indicate that the FBI estimates it will reach plaintiff's request in four months [redacted] Affidavit, para. 16). The appeals unit will process the appeal in about four months after the FBI has completed its review (Shea Affidavit, para. 11).

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The court denied our motion and allowed us fifteen days from the hearing date to file the previously ordered Vaughn v. Rosen statement.

DISCUSSION

We recommend appeal for the same reason that we recommended appeal in Open America v. Watergate Special Prosecution Force, et al. (copy of Memorandum attached), which appeal was authorized on April 12, 1976. We think that the Department should stand firm on the proposition that agencies must be permitted to process claims equitably on a first-come first-served basis, and should not be required by the courts to expedite those cases in which suits are filed at the expense of other requesters who patiently wait administrative action. While we may find the Ninth Circuit unsympathetic to nine-to-twelve month delays, at least the course of appealing to the various Circuits will make Congress and the courts aware that the FOIA and Privacy Act cannot be implemented in the time frame Congress fixed without an input of tremendous resources.

We point out, however, that this case presents more complex problems than Open America because it involves both the Privacy Act and the Freedom of Information Act. The authority given the courts to grant stays pending completion of administrative review of records is found only in the FOIA. However, since courts have inherent equity power to stay proceedings in other cases, the absence of a similar provision in the Privacy Act should not prove fatal.

There is also the possibility that plaintiff's allegations of fears for her personal safety, if taken seriously, will cause the court of appeals to be wary of condoning bureaucratic delays. However, the relationship between plaintiff's haste to publish and fears for her safety is tenuous at best, and the prompt publication of her book is her real concern. In this connection we note that Congress rejected a proposed amendment to the FOIA that would have required priority for the press and news media whose need to know would be nullified by time delays. Indeed "need to know" is not a consideration under the Act.

Finally, we are concerned that the Ninth Circuit will decline to take jurisdiction of the interlocutory appeal (although we are prepared to argue Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541) and to grant a stay before our Vaughn v. Rosen response is due. In that case,

we would wish to consider seeking a stay from Justice Rehnquist.

CONCLUSION

For the foregoing reasons we recommend seeking an expedited appeal and a stay pending appeal.

REX E. LEE
Assistant Attorney General
Civil Division

By:

Irving Jaffe
Deputy Assistant Attorney General

001 11:59:54 04/14/76

11 AA ASCAL .

TO: UNITED STATES ATTORNEY
SAN DIEGO, CALIFORNIA

REF: LKZUSMAN:JLI
145-12-2683

FM: REX E. LEE
ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION 739-2689
BY: JEFFREY AXELRAD, CHIEF
INFORMATION AND PRIVACY UNIT

RE: JUDITH KATHERINE EXNER V. FBI, ET AL.,
CIVIL ACTION NO. 76-0089-S, USDC SD CALIF.

WE REQUEST THAT YOU FILE A MOTION TO STAY PENDING APPEAL OF JUDGE SCHWARTZ'S RULING RENDERED IN COURT ON APRIL 12, 1976, DENYING OUR MOTION TO STAY JUDICIAL PROCEEDINGS PENDING COMPLETION OF AGENCY REVIEW OF THE DOCUMENTS UNDER 5 U.S.C. 552(A)(6)(C) IN THE ABOVE CASE. THE TEXT OF THE MOTION AS WELL AS AN ACCOMPANYING MEMORANDUM OF LAW ARE SET FORTH BELOW. WE ARE ALSO TRANSMITTING TO YOU A PROPOSED ORDER WHICH MUST BE IMMEDIATELY REFERRED TO PLAINTIFF'S ATTORNEY, MICHAEL C. LEONARD, FOR HIS APPROVAL, AND THEN TO JUDGE SCHWARTZ. WE REQUIRE A JUDICIAL COURT ORDER IN ORDER TO PERFECT OUR APPEAL AND THE PROCEDURE DESCRIBED ABOVE IS PER INSTRUCTIONS ZUSMAN RECEIVED APRIL 13, 1976, VIA THE JUDGE'S LAW CLERK. PLEASE MAKE SURE THAT THE MOTION AND MEMORANDUM ARE FILED IMMEDIATELY AND THAT THE PROPOSED ORDER IS LIKEWISE DISPATCHED TO LEONARD IMMEDIATELY. WE ANTICIPATE THAT JUDGE SCHWARTZ WILL DENY THE MOTION TO STAY AND THAT IS WHY THE PROPOSED ORDER IS DRAFTED AS IT IS.

THE TEXT OF THE MOTION TO STAY PENDING APPEAL IS AS FOLLOWS:

DEFENDANTS, BY THEIR UNDERSIGNED ATTORNEYS, HEREBY MOVE THE COURT, PURSUANT TO RULE 62 OF THE FEDERAL RULES OF CIVIL PROCEDURE, TO STAY ALL PROCEEDINGS AND ALL ORDERS IN THE ABOVE-CAPTIONED MATTER, IN THE DISTRICT COURT, PENDING COMPLETION OF APPELLATE PROCEEDINGS IN THIS MATTER.

THE DEFENDANTS RESPECTFULLY REFER THE COURT TO THE MEMORANDUM OF LAW WHICH ACCOMPANIES THIS MOTION.

DEFENDANTS FURTHER REQUEST THAT THE ORDER PREVIOUSLY RENDERED BE REVERSED TO WRITTEN FORM.

MEMORANDUM IN SUPPORT OF MOTION
FOR STAY PENDING APPEAL

PLAINTIFF SUED IN THE DISTRICT COURT SEEKING DECLARATORY RELIEF UNDER THE FREEDOM OF INFORMATION ACT AND THE PRIVACY ACT, 5 U.S.C. 552A, RESPECTIVELY, TO COMPEL DISCLOSURE OF DOCUMENTS RELATING TO HIMSELF. THE COURT FILED AN ORDER REQUIRING DEFENDANTS TO IDENTIFY AND INDEX ALL DOCUMENTS IT POSSESSES RELATING TO PLAINTIFF, WHETHER EXEMPT OR NOT, AND TO DISCLOSE TO PLAINTIFF IMMEDIATELY ALL DOCUMENTS THAT ARE NOT ALLEGEDLY EXEMPT UNDER ONE OF THE STATUTES FIELD IN AS WELL AS PROHIBITING DEFENDANTS FROM DISCLOSING TO ANYONE OTHER THAN THE PLAINTIFF OR THE COURT, THE CONTENTS OF THESE DOCUMENTS EXCEPT FOR "ROUTINE USE" AS DEFINED IN THE FREEDOM ACT. THE COURT ALSO DENIED DEFENDANTS' MOTION TO STAY JUDICIAL PROCEEDINGS PENDING COMPLETION OF AGENCY REVIEW OF THE REQUESTED INFORMATION. DEFENDANTS REQUESTS NOW A SHOWING OF "IRREparable HARM" AND "LACK OF DILIGENCE". DEFENDANTS REQUEST THE DISTRICT COURT PENDING APPELLATE PROCEEDINGS IN THIS MATTER.

GRANTING

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ACIN

DATE: 12:00:44 07/14/76

RE: AL. OSCAL.

PART II OF THE MEMO IN SUPPORT OF MOTION FOR STAY PENDING APPEAL.

DEFENDANTS CONTEND THAT THE STAY IS NECESSARY ON THE GROUNDS THAT IN ITS APPEAL, THE BASIS FOR THE APPEAL WILL BE MOOTED, PARTICULARLY IN REGARD TO THE ORDER REQUIRING IMMEDIATE DISCLOSURE TO THE PLAINTIFF. SEE STOP #3 ASSOCIATION V. VOLPE, 353 F. SUPP. 14 (D. MAINE 1972). A STAY SHOULD BE GRANTED TO PERMIT THE COURT OF APPEALS TO CONSIDER DEFENDANTS' CONTENTION. SEE SCHWARTZ V. COVINGTON, 341 F.2D 537 (9TH CIR. 1965); VIRGINIA PETROLEUM JOBBERS ASSN. V. FEDERAL POWER COM., 259 F.2D 921 (D.C. CIR. 1958). THE PUBLIC INTEREST WILL BE SERVED BY THE GRANT OF A STAY, TO ALLOW THE APPELLATE COURT TO INTERPRET A PROVISION OF THE FREEDOM OF INFORMATION ACT WHICH HAS NOT YET RECEIVED JUDICIAL APPELLATE SCRUTINY IN THIS CIRCUIT. PLAINTIFF HAS FAILED TO PROVE HOW SHE WILL BE HARMED IF THE STAY IS GRANTED. VIRGINIA JOBBERS, SUPRA. FURTHERMORE, THE ISSUANCE OF A LAUGHY L. RIGEN (F.D.P. #34 F.2D 820, 826-828, PRIOR TO THE SUBSTANTIVE DETERMINATION BY THE AGENCY OF WHETHER SOME DOCUMENTS WILL BE WITHHELD UNDER THE FOI ACT, IS VITIATED BY THE DEFENDANTS' UNWARRANTED AND EXCESSIVELY PREMATURE, AND IS LIKEWISE CONTRARY TO FIRST IMPRESSION IN THIS CIRCUIT, WHICH SHOULD BE RESOLVED BY THE COURT OF APPEALS.

FOR THE ABOVE REASONS, DEFENDANTS' MOTION TO STAY PENDING APPEAL SHOULD BE GRANTED.

PROPOSED ORDER

THIS MATTER HAVING COME BEFORE THE COURT ON DEFENDANTS' MOTION TO STAY FURTHER PROCEEDINGS PENDING COMPLETION OF REVIEW AND DEFENDANTS' MOTION TO STAY PENDING APPEAL AND THE COURT BEING FULLY ADVISED IN THE PREMISES AND HAVING CONCLUDED THAT DEFENDANTS' MOTIONS ARE NOT UNWARRANTED, IT IS THIS DAY OF APRIL, 1976,

ORDERED, THAT DEFENDANTS' MOTION TO STAY FURTHER PROCEEDINGS PENDING COMPLETION OF REVIEW AND DEFENDANTS' MOTION TO STAY PENDING APPEAL ARE BOTH GRANTED.

UNITED STATES DISTRICT COURT

IF YOU HAVE ANY FURTHER QUESTIONS REGARDING THIS MATTER, PLEASE CONTACT THE CLERK OF COURT. PLEASE SEND US COPIES OF ALL PAPERS FILED IN THIS MATTER. IT IS REQUESTED THAT YOU RETURN IT TO THE CLERK OF COURT.

U.S. DISTRICT COURT
CLERK, LITIGATION UNIT, DIRECTOR OF INVESTIGATION
FEDERAL BUREAU OF INVESTIGATION

United States Attorney
San Diego, California

April 2, 1976

Don E. Lee
Assistant Attorney General
Civil Division
By: Jeffrey Axelrad, Chief
Information and Privacy Unit

JAxelrad:pad
145-12-2633

Tel: 739-3390

Judith Katherine Exner v. FBI,
et al., LSDC SD Calif., Civil
Action No. 76-89-5.

Attention: John R. Neeco, Esquire
Chief, Civil Division

Enclosed are originals and three copies of
our Motion to Stay and supporting memorandum for
filing in the above-captioned litigation. Please
file and serve the motion as soon as possible and
advise us as to the date on which they are filed.
We assume that you will also file the answer which
was previously forwarded.

Should you desire, Lynne Eustan of this Office
is available to argue the Motion to Stay or to
assist you at the argument. In all events, Mrs.
Eustan will provide further assistance if necessary
on this matter. Please telephone her at 202-739-3259.

Please continue to keep us informed of all
developments in this litigation.

Enclosures

cc:

Chief, Freedom of Information
Litigation Unit
Federal Bureau of Investigation
Room 3646

EX-115

ENCLOSURE

REG-92

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55 MAY 17 1976

*Per telephone
call from Lynne Eustan
4/8/76. This was never
received by the U.S.A.
& she requested a new
affidavit as attached.
4/9/76 - JRM.*

MAY 8 3 20 PM '76

1 RICHARD C. LEONARD
2 Attorney at Law
3 2404 Wilshire Boulevard
4 Suite 400
5 Los Angeles, CA 90057
6
7 (213) 380-3330
8 Attorney for Plaintiff

9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA

11 JUDITH KATHERINE EXNER,

12 Plaintiff,

13 -vs-

14 FEDERAL BUREAU OF INVESTIGATION,
15 et al.,

16 Defendants.

17 CIVIL ACTION NO. 76-89-S

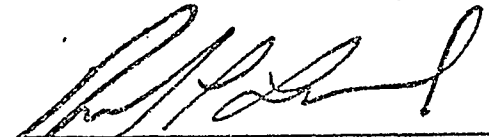
18 PLAINTIFF'S EX PARTE MOTION FOR
19 AN ORDER: (1) REQUIRING THE
20 GOVERNMENT TO RESPOND TO THE
21 AMENDED COMPLAINT BY MARCH 1,
22 1976; (2) REQUIRING THE GOVERN-
23 MENT TO PRODUCE THE FBI FILES
24 RELATING TO PLAINTIFF FOR THE
25 COURT'S IN CAMERA INSPECTION BY
26 MARCH 1, 1976; and (3) SHORTEN-
27 ING TIME TO SERVE AND FILE A
28 NOTICE OF MOTION AND MOTION
29 FOR SUMMARY JUDGMENT.

30 Plaintiff moves this Court for an order, pursuant to
31 Rule 78 of the Federal Rules of Civil Procedure and pursuant to
32 Rule 3(e) (7) of this Court, as follows:

1. Requiring the defendants to file their response to the amended complaint no later than March 1, 1976.
2. Requiring the defendants to file with this Court, for its in camera inspection, all records of the Federal Bureau of Investigation relating to the plaintiff.
3. Shortening time, permitting plaintiff to serve and file her notice of motion and motion for summary judgment by Wednesday, March 3, 1976, and to have the hearing date set on that motion for Monday, March 8, 1976.

1 This motion is based on all of the files and records
2 in this action, on the memorandum of points and authorities sub-
3 mitted concurrently with this motion, and upon the Affidavit of
4 Judith Katherine Exner filed concurrently herewith.

5 DATED: February 19, 1976.

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7 
8 RICHARD C. LEONARD

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1 to correct published inaccuracies which not only
2 have injured her reputation, but also which might
3 tend to influence Governmental decision-making and
4 the electorate [paragraphs 9, 10, and 11, p. 10,
5 1. 26, to p. 11, 1. 32].
6

7 2. SUMMARY OF PLAINTIFF'S REQUESTS.

8 The gravamen of plaintiff's request contained in this
9 ex parte motion is to expedite these proceedings brought pursuant
10 to the Privacy Act of 1974 [5 U.S.C. §552a], and the Freedom
11 of Information Act [5 U.S.C. §552]. Three methods of expedition
12 are requested:

- 13 (1) Plaintiff requests that the defendants answer the
14 amended complaint by March 1, 1976.
15 (2) Plaintiff requests that the Government produce
16 the applicable records by March 1, 1976, for the
17 Court's in camera inspection.
18 (3) Plaintiff requests that a motion for summary judgment
19 be calendared for March 8, 1976, to resolve
20 any questions left after the Court has reviewed
21 the documents.

22 As will be noted below, both the Privacy Act and the
23 Freedom of Information Act contain provisions for expediting
24 actions brought pursuant to those Acts, and the requests made
25 herein are reasonable under the circumstances.
26

27 3. IT IS IMPORTANT AND PROPER THAT THIS MATTER BE EXPEDITED.

28 Pursuant to Rule 12(a) of the Federal Rules of Civil
29 Procedure, the United States Government normally has 60 days to
30 respond to a complaint filed against it; however, Rule 12 permits
31 a different time to be fixed by order of the Court. The Freedom
32 of Information Act specifically provides for a 30-day period of

1 time in which the Government (or an agency thereof) must respond
2 to a complaint brought pursuant to the Freedom of Information
3 Act (5 U.S.C. §552(a)(4)(C)). That section of the Freedom of
4 Information Act also provides that the Court may direct a
5 different time period in which a complaint should be answered.

6 The Privacy Act, although containing no specific
7 reference to a time period in which the Government must respond
8 to a complaint filed pursuant to that Act, does give several
9 indications that expediency was thought important by the drafters
10 of the legislation. For example, in several portions of the
11 Act (including 5 U.S.C. §552a (d)(2)(A)), a time period of "not
12 later than ten days" is provided. In regard to bringing a matter
13 on for hearing before the District Court, which has jurisdiction
14 both over the Freedom of Information Act and over the Privacy
15 Act matters, the Freedom of Information Act specifically provides
16 at 5 U.S.C. §552(a)(4)(D), as follows:

17 "Except as to cases the court considers of greater
18 importance, proceedings before the district court, as
19 authorized by this subsection, and appeals therefrom,
20 take precedence on the docket over all cases and shall
21 be assigned for hearing and trial or for argument at
22 the earliest practicable date and expedited in every
23 way."

24 As demonstrated by the Affidavit of Judith Katherine
25 Exner, it is important that this matter be expedited. Not only
26 is the integrity of a Senate Select Committee report at stake,
27 but the integrity of an individual also is on the line, as is
28 her personal safety.

29 The Government cannot contend that it has not had
30 sufficient time to review Mrs. Exner's request. As the exhibits
31 to the amended complaint in this action demonstrate, the original
32 request to the FBI was made to it by letter dated December 24,

1 1975. This was followed up on several occasions by further
2 requests and the necessary statutory appeals. It is only through
3 inaction on the part of the FBI that this action was necessitated,
4 because no actual refusal to review the records was ever given
5 to plaintiff. Instead, Quinlan J. Shea, Jr., Chief of the Freedom
6 of Information and Privacy unit of the Department of Justice,
7 which handles appeals on Privacy Act and Freedom of Information
8 Act requests to the FBI, stated to counsel for Mrs. Exner in a
9 letter dated February 5, 1976, [Exhibit "4" to the amended
10 complaint] that:

11 "You may, if you choose to do so, elect to treat
12 this letter as a denial of your administrative appeal
13 by the Deputy Attorney General and seek relief in the
14 courts."

15 The FBI has known about this request for approximately two months.
16 Since the FBI apparently has already compiled a file on plaintiff,
17 and has turned that over to a Senate Select Committee, it should
18 not be a burdensome task for the FBI to make that same file
19 available to this Court, and, subsequently, to Mrs. Exner.
20

21 4. THE PROPER METHOD TO PROCEED IN THIS ACTION IS FOR THE
22 COURT TO IMMEDIATELY REVIEW THE FBI FILE ON MRS. EXNER
23 IN CHAMBERS.

24 The Privacy Act sets forth a statutory scheme whereby
25 a person has the right:

26 "Upon request. . .to gain access to his record
27 or to any information pertaining to him which is
28 contained in [the records of a Governmental agency],
29 permit him and upon his request, a person of his own
30 choosing to accompany him, to review the record and
31 have a copy made of all or any portion thereof in a
32 form comprehensible to him, . . .and .

1 "Permit the individual to request amendment
2 of a record pertaining to him. . ." [5 U.S.C.
3 §552a (d) (1) and (2)]

4 If the Government fails to comply with a Privacy Act
5 request, the Act further provides for the bringing of an action
6 to (1) seek an order that the agency be enjoined from withholding
7 the records from the individual; and (2) requiring the agency to
8 amend the records, as the court may direct. The conduct of the
9 court, in Privacy Act matters, is defined in 5 U.S.C. §552a
10 (g) (3) (A):

11 "In any suit brought under the provisions of
12 subsection (g) (1) (B) of this section, the court may
13 enjoin the agency from withholding the records and
14 order their production to the complainant of any
15 agency records improperly withheld from him. In
16 such a case the court shall determine the matter
17 de novo, and may examine the contents of any agency
18 records in camera to determine whether the records
19 or any portion thereof may be withheld under any of
20 the exemptions set forth in subsection (k) of this
21 section, and the burden is on the agency to sustain
22 its action."

23 The Freedom of Information Act also contains similar language
24 relating to the trial court's role:

25 "On complaint, the District Court of the United
26 States in the district in which the complainant
27 resides or has his principal place of business, or
28 in which the agency records are situated, or in the
29 District of Columbia, has jurisdiction to enjoin the
30 agency from withholding the agency records and to
31 order the production of any agency records improperly
32 withheld from the complainant. In such a case the

1 court shall determine the matter de novo, and may
2 examine the contents of such agency records in camera
3 to determine whether such records or any part thereof
4 shall be withheld under any of the exemptions set
5 forth in subsection (b) of this section, and the
6 burden is on the agency to sustain its action."

7 [5 U.S.C. §552(a)(4)(B)]

8 Although the decision in Vaughn v. Rosen, 484 F.2d 820
9 (D.C. Cir., 1973), relates solely to the Freedom of Information
10 Act, the reasoning in that opinion is equally applicable to the
11 Privacy Act of 1974. In Vaughn, the appellate court was con-
12 cerned with the procedures which the district court should follow
13 in considering requests under the Freedom of Information Act.
14 The court characterized the type of situation presented in a
15 Freedom of Information Act case, as follows:

16 "The Freedom of Information Act was conceived in
17 an effort to permit access by the citizenry to most
18 forms of Government records. In essence, the Act pro-
19 vides that all documents are available to the public
20 unless specifically exempted by the Act itself. This
21 court has repeatedly stated that these exemptions
22 from disclosure must be construed narrowly, in such a
23 way as to provide the maximum access consonant with
24 the overall purpose of the Act. By like token and
25 specific provision of the Act, when the Government
26 declines to disclose a document the burden is upon
27 the agency to prove de novo in trial court that the
28 information sought fits under one of the exemptions
29 to the FOIA. Thus the statute and the judicial
30 interpretations recognize and place great emphasis
31 upon the importance of disclosure.

32 "In light of this overwhelming emphasis upon

1 disclosure, it is anomalous but obviously inevitable
2 that the party with the greatest interest in obtain-
3 ing disclosure is at a loss to argue with desirable
4 legal precision for the revelation of the concealed
5 information. Obviously the party seeking disclosure
6 cannot know the precise contents of the documents
7 sought; secret information is, by definition, unknown
8 to the party seeking disclosure. In many, if not
9 most, disputes under the FOIA, resolution centers
10 around the factual nature, the statutory category,
11 of the information sought. In a very real sense,
12 only one side to the controversy (the side opposing
13 disclosure) is in a position confidently to make
14 statements categorizing information. . . ." [Footnotes
15 omitted] (484 F.2d at 823-824)

16 The court in Vaughn suggested that one method by which the trial
17 judge could proceed in Freedom of Information Act cases is to
18 examine the requested documents in camera:

19 "This lack of knowledge by the party [seeking]
20 disclosure seriously distorts the traditional adver-
21 sary nature of our legal system's form of dispute
22 resolution. Ordinarily, the facts relevant to a
23 dispute are more or less equally available to adverse
24 parties. In a case arising under the FOIA this is
25 not true, as we have noted, and hence the typical
26 process of dispute resolution is impossible. In
27 an effort to compensate, the trial court, as trier
28 of fact, may and often does examine the document
29 in camera to determine whether the Government has
30 properly characterized the information as exempt.
31 Such an examination, however, may be very burden-
32 some, and is necessarily conducted without benefit

1 of criticism and elimination by a party with the
2 actual interest enforcing disclosure." (484 F.2d
3 at 824-825)

4 The appellate court in Vaughn continued on to suggest that if the
5 documents are exceedingly long, a special master can be appointed,
6 depending on the desires of the trial judge.

7 In the instant situation where the equities seem to
8 indicate that disclosure is proper and warranted, any objection
9 the Government has to disclosure can be easily resolved by the
10 Court's reviewing the documents in camera. At a minimum, certain
11 documents can be turned over to the plaintiff, and the remaining
12 documents, where some objection lies, can be reviewed either by
13 the Court or by a special master. In Vaughn, the appellate court
14 specifically noted the fact that although some documents may be
15 exempt from disclosure, in many cases only portions of documents
16 may be covered by an exemption to the Act. The appellate court
17 noted that non-exempt documents should be turned over to the
18 plaintiff (see Vaughn, 484 F.2d at 825).

19 Although not raised in the context of a Privacy Act
20 case, the holding in Chastain v. Kelly, 510 F.2d 1232, 1237
21 (D.C. Cir., 1975), is important. In that action, brought by an
22 FBI agent against the director of the FBI, plaintiff was seeking
23 to have portions of his FBI record expunged, and to have the FBI
24 notify other agencies which had received copies of the inaccurate
25 records of their inaccuracies. The appellate court in Chastain
26 made the following observation:

27 "The part of the challenged order to which we see
28 least objection is that requiring the Bureau [FBI] to
29 inform other agencies to which it has hitherto dissemi-
30 nated information about this matter that appellee was
31 not in fact disciplined for it. Certainly it is the
32 Bureau's obligation to correct any erroneous information."

1 Since it appears from the Affidavit of Judith Katherine Exner
2 that the FBI has circulated inaccurate information about her,
3 that information should be corrected, and the only way to
4 accomplish that is to allow Mrs. Exner to review the records,
5 and to note the necessary corrections.

6 Although there is little if no case law regarding
7 interpretations of the Privacy Act; which did not take effect
8 until September of 1975, it is obvious from the Congressional
9 history of that Act that its intent is to permit review of
10 records by individuals affected by such records wherever possible.
11 Based on the legislative history of the Privacy Act, Congress
12 held that the purpose of the Act, inter alia, is to:

13 "(1) Permit an individual to determine what
14 records pertaining to him are collected, maintained,
15 used, or disseminated by such agencies;

16 "(2) Permit an individual to prevent records
17 pertaining to him obtained by such agencies for a
18 particular purpose from being used or made avail-
19 able for another purpose without his consent;

20 "(3) Permit an individual to gain access to
21 information pertaining to him in Federal agency
22 records, to have a copy made of all or any portion
23 thereof, and to correct or amend such records;

24 "(4) Collect, maintain, use, or disseminate
25 any record of identifiable personal information in
26 a manner that assures that such action is for a
27 necessary and lawful purpose, that the information
28 is current and accurate for its intended use, and
29 that adequate safeguards are provided to prevent
30 misuse of such information; . . ."

31 / / / /

/ / / /

32 / / / /


/ / / /

1 5. CONCLUSION.

2 Judith Katherine Exner has been brought into the public
3 spotlight, contrary to her desire, and in violation of a promise
4 made to her by a Select Committee of the United States Senate.
5 Information about Mrs. Exner has been leaked to the press. Some
6 of that information is inaccurate. Mrs. Exner's health and
7 safety have been jeopardized by an unwarranted disclosure of her
8 identity. She seeks to correct those abuses which have brought
9 her to this point in time, and she seeks to correct inaccuracies,
10 not only which threaten her psychological makeup and her safety,
11 but also which now have been incorporated into an official report
12 of a Senate Select Committee which deals with matters of grave
13 national concern.

14 The first step necessary to correct these abuses is to
15 provide Mrs. Exner with an opportunity to review the file main-
16 tained on her by the Federal Bureau of Investigation. By means
17 of this motion, we are attempting to expedite the process which
18 has been initiated.

19 DATED: February 19, 1976.

20
21 
22 RICHARD C. LEONARD

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2
3 ACKNOWLEDGMENT OF SERVICE

4 Receipt of a copy of Plaintiff's Ex Parte Motion for
5 an Order: (1) Requiring the Government to Respond to the Amended
6 Complaint by March 1, 1976; (2) Requiring the Government to Pro-
7 duce the FBI Files Relating to Plaintiff for the Court's In
8 Camera Inspection by March 1, 1976; and (3) Shortening Time to
9 Serve and File a Notice of Motion and Motion for Summary Judgment
is hereby acknowledge this 19th day of February, 1976.

10
11 By Pat W. Bernin
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1 RICHARD C. LEONARD
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4 (213) 380-3330

5 Attorney for Plaintiff

6
7
8 UNITED STATES DISTRICT COURT

9 SOUTHERN DISTRICT OF CALIFORNIA

10
11 JUDITH KATHERINE EXNER,

12 Plaintiff,

13 -vs-

14 FEDERAL BUREAU OF INVESTIGATION,
15 et al.,

16 Defendants.

) CIVIL ACTION NO. 76-89-S

)
) AFFIDAVIT OF JUDITH KATHERINE
) EXNER IN SUPPORT OF PLAINTIFF'S
) MOTION FOR AN EX PARTE ORDER

17
18 STATE OF CALIFORNIA)
19) ss:
COUNTY OF LOS ANGELES)

20 Judith Katherine Exner, being first duly sworn, deposes
21 and states that:

22 1. I am the plaintiff in the above-captioned action.
23 This Affidavit is made in support of Plaintiff's Ex Parte Motion
24 which seeks an order requiring the Government to respond to my
25 Amended Complaint for Injunctive Relief Under the Privacy Act of
26 1974, and the Freedom of Information Act by March 1, 1976, and
27 to produce any and all records compiled or maintained by the
28 Federal Bureau of Investigation which relate to me. It is my
29 desire that these FBI records be turned over to the Court for its
30 in camera inspection, and that the Court determine whether I can
31 personally review these records pursuant to the provisions of the
32 Privacy Act of 1974.

1 2. In considering my request for the right to review
2 the FBI documents which relate to me, I feel that it is important
3 to keep in mind that my current situation has been created, not
4 by my own doing, but by the United States Government, itself,
5 which, through a special Senate Select Committee, leaked personal
6 information about me to the national press after I had been
7 assured that this information would be kept private and confi-
8 dential. Although I will detail the facts relating to this
9 incident later in this Affidavit, I feel that it is important for
10 the Court to understand that my relationship with John F. Kennedy,
11 Sam Giancana, and others, which formed the basis of my testimony
12 before an executive session of the Senate Select Committee dates
13 back to a period of time between 1960 and 1962. For 16 years I
14 made no effort to publicize my relationship with the late
15 President Kennedy. It was only after inaccurate information had
16 been leaked to the national press, which information I felt put
17 my safety in danger, that I determined that it was necessary to
18 make certain details of my relationship with President John F.
19 Kennedy, and others, public.

20 3. There is no doubt in my mind that the Federal
21 Bureau of Investigation does have a file either which is based
22 on me, or which contains information about me. I make this
23 statement based on the following personal observations:

24 3.1) In September of 1975, I was subpoenaed to
25 testify before the Senate Select Committee to Study Govern-
26 mental Operations with Respect to Intelligence Activities.
27 Majority legal counsel for that Committee was Frederick A.
28 O. Schwarz, Jr., Esq. The subject matter of my testimony
29 concerned my relationship with former President John F.
30 Kennedy, and with Sam Giancana (who was murdered
31 approximately ten days prior to the day he was to testify
32 before the same Senate Select Committee), and John Rosselli.

1 I testified before an executive session of the Committee
2 for approximately three hours on Saturday, September 20,
3 1975. During my questioning, counsel for the Committee con-
4 tinuously referred to a folder of documents which was several
5 inches thick. Contained in those documents were phone call
6 records which related to me, as well as other materials.
7 During the course of my testimony, majority counsel Schwarz
8 asked Mr. Bushong, an attorney/investigator for the Commit-
9 tee, where certain materials in my file came from.
10 Mr. Bushong answered that the material came "from the FBI".

11 3.2) In addition to the comment made by Mr. Bushong,
12 my husband, Daniel R. Exner, in my presence, asked
13 Mr. Smothers, Minority Counsel for the Committee, where
14 certain information referred to by the Senate Select
15 Committee was derived. Mr. Smothers told me and my husband
16 that this information came "from the FBI".

17 3.3) During the course of my testimony before the
18 Committee, Majority Counsel Schwarz, and other persons who
19 participated in the executive session of the Committee meet-
20 ing, referred to a file which they were using in the process
21 of examining me as being a file obtained from the records of
22 the FBI.

23 3.4) The nature of the questions asked me by the
24 Senate Select Committee indicated that some of the material
25 was derived from investigations of me and/or other people
26 during the early part of the 1960's. For example, some of
27 the questions asked by the Committee demonstrated knowledge
28 of my whereabouts during the early part of the 1960's. The
29 only other persons who might have been aware of certain of
30 my travels were Sam Giancana, John F. Kennedy, and Frank
31 Sinatra. To my knowledge, and based upon materials which
32 have appeared in the national press, Frank Sinatra never

1 testified before the Committee. Both Sam Giancana and John
2 F. Kennedy are deceased, and could not have testified before
3 the Committee. Unless I was the subject of an FBI investi-
4 gation during the early portion of the 1960's, I do not
5 believe the Senate Select Committee would have had this type
6 of information available to it.

7 3.5) In fact, I am aware that during the early
8 portion of the 1960's I was the subject of an investigation
9 by the Federal Bureau of Investigation. In March of 1960,
10 I first met Sam Giancana. Shortly after that meeting, I
11 was interviewed in Los Angeles by two persons who identified
12 themselves as members of the Federal Bureau of Investigation,
13 and who showed me proper credentials. Either at that initial
14 meeting, or at some time shortly thereafter, I was also
15 interviewed by Mr. Harold Dodge who identified himself as
16 an agent of the FBI, and who showed me his credentials. For
17 the next approximately four-year period, until some time in
18 1964, Mr. Dodge, and other ~~FBI agents~~, kept me under
19 surveillance. On at least 40 occasions, Mr. Dodge stopped
20 me on the street in the Los Angeles area to ask me questions.
21 On one occasion (which I believe happened in or around 1961),
22 I discovered two persons, who identified themselves as FBI
23 agents, in my apartment in Los Angeles. In 1965, while I was
24 at my parents' home, my mother was approached by 2 FBI agents
25 who appeared at her home to ask her questions about me.
26 In 1971 or 1972, I was again interviewed by two men who
27 showed me credentials of the Federal Bureau of Investigation,
28 and who identified themselves as FBI agents. On several
29 occasions, I copied down the California license plate
30 numbers of certain vehicles which were following my car.
31 Upon having the license plates of these cars checked through
32 the Department of Motor Vehicles, I was informed that no

1 such plates were registered in the State of California, even
2 though they appeared to be standard California license
3 plates.

4 . 3.6) In addition to the questions asked me by the
5 Senate Select Committee, and my own knowledge about the FBI
6 investigation of me, the report issued by the Senate Select
7 Committee also contains reference to an FBI investigation of
8 me. Attached hereto as Exhibit "1" and incorporated herein
9 by this reference are pages 129 to 131 of the report of the
10 Senate Select Committee, which was issued on November 20,
11 1975. I am referring specifically to that portion of the
12 report which is entitled, "Did President Kennedy Learn
13 Anything About Assassination Plots as a Result of the FBI
14 Investigation of Giancana and Rosselli?" In that report, I
15 was referred to as a "friend" of the late President. The
16 failure of the report to indicate my name, or even my sex,
17 was based on an agreement reached by the Senate Select
18 Committee Counsel, F. A. O. Schwarz, with my counsel. The
19 decision not to identify me was based, in part, on the fact
20 that the disclosure of my identity only would constitute a
21 serious intrusion on my right of privacy, and in all likeli-
22 hood, would subject me to unreasonable harassment. Moreover,
23 the Committee counsel agreed that disclosure of my identity
24 would in no way further the efforts of the Senate Select
25 Committee. The report of the Committee contains the follow-
26 ing information:

27 "Evidence before the Committee indicates that a
28 close friend of President Kennedy [myself] had fre-
29 quent contact with the President from the end of
30 1960 through mid-1962. FBI reports and testimony
31 indicate that the President's friend was also a
32 close friend of John Rosselli and Sam Giancana and

1 saw them often during the same period.

2 "On February 27, 1962, Hoover [J. Edgar Hoover,
3 head of the Federal Bureau of Investigation] sent
4 identical copies of a memorandum to the Attorney
5 General and Kenneth O'Donnell, Special Assistant to
6 the President. The memorandum stated that informa-
7 tion developed in connection with a concentrated
8 FBI investigation of John Rosselli revealed that
9 Rosselli had been in contact with the President's
10 friend. The memorandum also reported that the
11 individual was maintaining an association with Sam
12 Giancana, described as 'a prominent Chicago under-
13 world figure.' Hoover's memorandum also stated
14 that a review of the telephone toll calls from the
15 President's friend's residence revealed calls to
16 the White House. The President's secretary ulti-
17 mately received a copy of the memorandum and said
18 she believed she would have shown it to the
19 President.

20 "The association of the President's friend with
21 the 'hoodlums' and that person's connection with the
22 President was again brought to Hoover's attention in
23 a memorandum preparing him for a meeting with the
24 President planned for March 22, 1962. Courtney Evans
25 testified that Hoover generally required a detailed
26 summary of information in the FBI files for drafting
27 important memoranda or preparing for significant
28 meetings. . . . The FBI files on Giancana then con-
29 tained information disclosing Giancana's connection
30 with the CIA as well as his involvement in assassina-
31 tion plotting." (Pages 129 to 130 of the Select
32 Committee report) [Emphasis added; footnotes omitted.]

1 4. Although my testimony before the executive session
2 of the Senate Select Committee was to remain confidential, my
3 testimony was leaked to the press prior to the issuance of the
4 report of the Senate Select Committee. The report issued on
5 November 20, 1975; however, on November 16, 1975, an article
6 appeared in the Washington Post, which identified me, by name,
7 as the "friend of the President" contained in the report. A copy
8 of the Washington Post article of Sunday, November 16, 1975, is
9 attached hereto as Exhibit "2" and incorporated herein by this
10 reference. Further leaks from the Senate Select Committee
11 reached the press, as demonstrated by the release put out by
12 Dan Thomasson and Tim Wyngaard of the Scripps-Howard News Service
13 dated November 18, 1975. A copy of the November 18, 1975,
14 Scripps-Howard press release is attached hereto as Exhibit "3"
15 and incorporated herein by this reference. The Scripps-Howard
16 report specifically refers to FBI documents in the hands of the
17 Senate Select Committee relating to my relationship with President
18 John Fitzgerald Kennedy. Apparently, members of the Senate
19 Select Committee leaked not only my identity, but also the con-
20 tents of FBI documents--the same documents which the FBI now
21 refuses to turn over to me for my inspection.

22 5. As demonstrated by the exhibits attached to the
23 Amended Complaint for Injunctive Relief Under the Privacy Act
24 of 1974 and the Freedom of Information Act, filed in this action,
25 [Exhibit "4" to the Amended Complaint], my request for the right
26 to review the FBI file relating to me has been denied. I under-
27 stand that the Privacy Act of 1974 [5 U.S.C. §552(a)] permits a
28 person to review the records maintained by a Governmental agency
29 relating to that person. Based on the legislative history of
30 the Privacy Act, Congress held that the purpose of the Act,
31 inter alia, is to:

32 "(1) Permit an individual to determine what

1 records pertaining to him are collected, maintained,
2 used, or disseminated by such agencies;

3 "(2) Permit an individual to prevent records
4 pertaining to him obtained by such agencies for a
5 particular purpose from being used or made avail-
6 able for another purpose without his consent;

7 "(3) Permit an individual to gain access to
8 information pertaining to him in Federal agency
9 records, to have a copy made of all or any portion
10 thereof, and to correct or amend such records;

11 "(4) Collect, maintain, use, or disseminate
12 any record of identifiable personal information in
13 a manner that assures that such action is for a
14 necessary and lawful purpose, that the information
15 is current and accurate for its intended use, and
16 that adequate safeguards are provided to prevent
17 misuse of such information; . . ."

18 6. Based on questions asked me by the Senate Select
19 Committee, and based on the final published report of the Commit-
20 tee, and on information leaked from the Committee to the press,
21 I know that information contained in my FBI record is inaccurate.
22 Not only have these inaccuracies found their way into the report
23 of the Senate Select Committee, but they have undermined my
24 personal integrity and reputation for truthfulness. Although I
25 cannot detail all of the inaccuracies (since I have not seen the
26 FBI files), I know that the following inaccuracies are contained
27 in the FBI materials:

28 6.1) During the course of my testimony before the
29 executive session of the Senate Select Committee, I was
30 questioned as to telephone calls I placed to the late
31 President Kennedy. Members of the Committee indicated in
32 questioning that my FBI record noted the fact that some of

1 these calls were made from a private residence in Palm
2 Springs (other than my own), and from Sam Giancana's house
3 in the Chicago area. Both the reference to the house in
4 Palm Springs, and the reference to telephone calls placed
5 from Giancana's house are inaccurate.

6 6.2) The published report of the Senate Select
7 Committee indicates that my communications with the late
8 President Kennedy ceased a few hours after a March 22, 1962,
9 meeting between J. Edgar Hoover and President Kennedy. This
10 is not true. My communications with the late President
11 lasted until the latter part of 1962.

12 7. As I previously noted, I feel that it is important
13 to keep in mind that the present situation--the publicity of my
14 relationship with the late President Kennedy--has been created
15 by the Senate Select Committee's leak to the national press, and
16 not because of any actions taken by me. My relationship with
17 the late President began in the early part of 1960 before his
18 nomination as Democratic candidate for President. That close
19 personal relationship lasted until the latter part of 1962. My
20 relationship with Sam Giancana began approximately one month
21 after my first meeting with President Kennedy (then Senator
22 Kennedy), and continued during the same period of time. During
23 the 16-year period from my first meeting with John F. Kennedy
24 up to the time I was forced to disclose facts about my relation-
25 ship with the President, in December of 1975, I made no attempt
26 to make my relationship with the late President public. In fact,
27 I did everything in my power to keep it private. It was only
28 after I was subpoenaed by the Senate Select Committee that
29 knowledge of my relationship with President Kennedy became public.
30 Even after my testimony in the executive session of the Senate
31 Select Committee, I, along with the assistance of counsel, pro-
32 vided to me by the Committee, took every possible step to see

1 that my identity was kept confidential, and the nature of my
2 relationship kept private. In violation of an agreement reached
3 with me by the Senate Select Committee, allegedly with unanimous
4 consent the Committee (or some member thereof) leaked my name and
5 facts about my relationship with the late President to the press.

6 8. The first leak to the press occurred on or about
7 November 16, 1975. Shortly thereafter, numerous other matters,
8 many of which having no basis and fact, appeared in national
9 publications. Several of these publications linked me both to
10 the President and to the Mafia, and to a conspiracy to assassi-
11 nate Fidel Castro. I never played any role in such an assassi-
12 nation attempt, and had no knowledge of any such assassination
13 attempt. Because of the outrageous comments appearing in the
14 press, however, I became fearful for my safety, especially
15 knowing that Sam Gianana had been murdered after he was subpoenaed
16 to testify before the same Senate Select Committee, but prior to
17 the time he was to give his testimony. An example of some of
18 the outrageous headlines appearing in newspapers throughout the
19 country is attached hereto as Exhibit "4" and incorporated herein
20 by this reference. The article, and the headline, which appeared
21 in the Chicago Daily News shortly after the publication of the
22 Senate Select Committee report stated in bold letters:

23
24 "SENATE REPORT LINKS WOMAN, JFK, MOB."
25

26 9. Following the publication of hundreds, if not
27 thousands of news articles relating to me, which articles specu-
28 lated as to my role in an assassination plot, and the nature of
29 my relationship with "purported underworld figures", I determined
30 that the best and safest course I could follow was to publicly
31 appear and explain my relationship, in general terms, with
32 President John F. Kennedy, Sam Giancana, John Rosselli, and

1 others. On December 17, 1975, I held a press conference. A copy
2 of the statement I read at that press conference is attached
3 hereto as Exhibit "5" and incorporated herein by this reference.
4 It was my thought that by making a public disclosure of the
5 general nature of my actual relationship with the President and
6 others, I could stop some of the speculation and misinformation
7 that surrounded me. I also determined at the time of my press
8 conference that it would be best if I would commit my knowledge
9 to writing. I felt that if the truth were known about my rela-
10 tionship with the late President and with other prominent figures,
11 that my safety would be preserved.

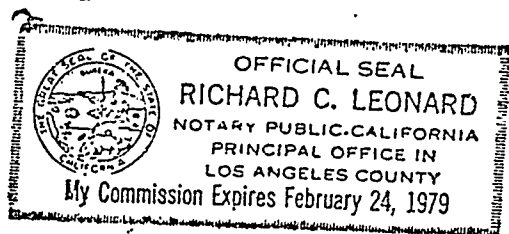
12 10. I feel it is very important that I am able to
13 review the FBI records relating to me. Not only are those records
14 necessary to prove the accuracy of my own recollections, but also
15 I feel it is necessary to correct misinformation contained in
16 those records, which misinformation has found its way into a
17 published Senate Select Committee report, and into the press.
18 Because of the murder of Sam Giancana, and because of threatening
19 telephone calls I have recently received, I feel it is important
20 that this information be recorded as quickly as possible. It is
21 for these reasons that I am requesting that the Court expedite
22 this litigation and require the Federal Bureau of Investigation,
23 the Department of Justice, and the United States Government to
24 turn over records relating to me to the Court so the Court can
25 review them and determine whether I have the right to make my
26 own personal review of the records.

27 11. Although I am anxious to review the FBI records
28 relating to me, I am also anxious to have these records remain
29 private. I request that the Court take no steps which would
30 interfere with the privacy aspects of the FBI records until such
31 time as I have a right to review them, and make necessary requests
32 to correct the records.

Judith Katherine Exner
JUDITH KATHERINE EXNER

SUBSCRIBED AND SWORN to before me
this 18 day of February, 1976.

Richard C. Leonard
Notary Public



With the exception of this briefing, the FBI and Justice files indicate no other activity in the Palletti wiretap case from September 1961 through January 1962. There was no activity in the assassination effort involving underworld figures from April 1961 until mid-April 1962.

c. 1962.—A note of January 29, 1962, from the head of the Administrative Regulations Division to the first and second assistants in the Criminal Division stated:

Our primary interest was in Giancana . . . apparently detective (Maheu) has some connection with Giancana but he claims was because of CIA assignment in connection with Cuba.—CIA has objected, may have to drop.

Assistant Attorney General Herbert Miller then asked the FBI to speak with Edwards about the prosecution of Maheu. (Memo from Miller, 1/31/62)

FBI memorandum dated February 24, 1962, set forth Miller's request that Edwards be reinterviewed about possible prosecutions in the Palletti case. A reply memorandum from the FBI to Miller on February 7, 1962, stated that Edwards had been contacted and that he was referred to the prosecution.

Did President Kennedy Learn Anything About Assassination Attempts as a Result of the FBI Investigation of Giancana and Rosselli?

As elaborated in the previous sections of this report, all living CIA officials who were involved in the underworld assassination attempt or who were in a position to have known of the attempt have testified that they never discussed the assassination plot with the President. By May 1961, however, the Attorney General and Hoover were aware that the CIA had earlier used Giancana in an operation against Cuba and FBI files contained two memoranda which, if simultaneously reviewed, would have led one to conclude that the CIA operation had involved assassination.¹ There is no evidence that any one within the FBI concluded that the CIA had used Giancana in an assassination attempt. The Committee has uncovered a chain of events, however, which would have given Hoover an opportunity to have assembled the entire picture and to have reported the information to the President.

Evidence before the Committee indicates that a close friend of President Kennedy had frequent contact with the President from the end of 1960 through mid-1962. FBI reports and testimony indicate that the President's friend was also a close friend of John Rosselli and Sam Giancana and saw them often during this same period.²

On February 27, 1962, Hoover sent identical copies of a memorandum to the Attorney General and Kenneth O'Donnell, Special Assistant to the President. The memorandum stated that information developed in connection with a concentrated FBI investigation of John Rosselli revealed that Rosselli had been in contact with the President's

¹The two memoranda, which are discussed in considerable detail *supra*, were the October 18, 1960, memorandum linking Giancana to an assassination plot (but not mentioning CIA) and the May 22, 1961, memorandum linking Giancana to a CIA operation against Cuba involving "dirty business" (but not mentioning assassination).

²White House telephone logs show 70 instances of phone contact between the White House and the President's friend whose testimony concerns frequent phone contact with the President himself.

Both the President's friend and Rosselli testified that the friend did not know about either the assassination operation or the wiretap case. Giancana was killed before he was available for questioning.

friend. The memorandum also reported that the individual was maintaining an association with Sam Giancana, described as "a prominent Chicago underworld figure." Hoover's memorandum also stated that a review of the telephone toll calls from the President's friend's residence revealed calls to the White House. The President's secretary ultimately received a copy of the memorandum and said she believed she would have shown it to the President.

The association of the President's friend with the "hoodlums" and that person's connection with the President was again brought to Hoover's attention in a memorandum preparing him for a meeting with the President planned for March 22, 1962. Courtney Evans testified that Hoover generally required a detailed summary of information in the FBI files for drafting important memoranda or preparing for significant meetings. (Evans, S/28/75, pp. 70, 72) The FBI files on Giancana then contained information disclosing Giancana's connection with the CIA as well as his involvement in assassination plotting. (Memoranda of 10/18/60 and 5/22/61)

On March 22, Hoover had a private luncheon with President Kennedy. There is no record of what transpired at that luncheon. According to the White House logs, the last telephone contact between the White House and the President's friend occurred a few hours after the luncheon.

The fact that the President and Hoover had a luncheon at which one topic was presumably that the President's friend was also a friend of Giancana and Rosselli raises several possibilities. The first is, assuming that Hoover did in fact receive a summary of FBI information relating to Giancana prior to his luncheon with the President, whether that summary reminded the Director that Giancana had been involved in a CIA operation against Cuba that included "dirty business" and further indicated that Giancana had talked about an assassination attempt against Castro. A second is whether Hoover would then have taken the luncheon as an opportunity to fulfill his duty to bring this information to the President's attention.¹ What actually transpired at that luncheon may never be known, as both participants are dead and the FBI files contain no records relating to it.

On March 23, 1962, the day immediately following his luncheon with the President, at which Rosselli and Giancana were presumably discussed, Hoover sent a memorandum to Edwards stating:

At the request of the Criminal Division of the Department of Justice, this matter was discussed with the CIA Director of Security on February 7, 1962, and we were advised that your agency would object to any prosecution which would necessitate the use of CIA personnel or CIA information. We were also informed that introduction of evidence concerning the CIA operation would be embarrassing to the Government.

The Criminal Division has now requested that CIA specifically advise whether it would or would not object to the initiation of criminal prosecution against the subjects, Balletti, Mahon, and the individual known as J. W. Harrison for conspiracy to violate the "Wire Tapping Statute."

¹The President, thus notified, might then have inquired further of the CIA. The Presidential calendar indicates that the President had meetings at which most CIA officials willing of the assassination plot were present during the period from February 27 through April 2, 1962. All of those persons, however, have testified that the President never asked them about the assassination plot.

An early reply will be appreciated in order that we may promptly inform the Criminal Division of CIA's position in this matter.¹

As a result of this request, the CIA did object to the prosecution of those involved in the wiretap case, thereby avoiding exposure of Giancana's and Roselli's involvement with the Agency in an assassination plot. We now turn to events which occurred during April and May 1962 which culminated in the formal decision to forego prosecution in the wiretap case.

(2) *The Formal Decision to Forego Prosecution.*

(a) *Events Leading up to a Formal Briefing of the Attorney General.*

A memorandum for the record of April 4, 1962, reflects that Edwards met with Sam Papich, the FBI liaison to the CIA, on March 28 or 29 and told Papich that:

Any prosecution in the matter would endanger sensitive sources and methods used in a duly authorized intelligence project and would not be in the national interest. (Edwards' memorandum, 4/4/62)

A memorandum for Assistant Attorney General Miller from Hoover dated April 10, 1962, stated that Edwards:

Has now advised that he has no desire to impose any restriction which might hinder efforts to prosecute any individual, but he is firmly convinced that prosecution of Mahen undoubtedly would lead to exposure of most sensitive information relating to the abortive Cuban invasion in April 1961, and would result in most damaging embarrassment to the U.S. Government. He added that in view of this, his agency objects to the prosecution of Mahen. (Memo, Hoover to Miller, 4/10/62)

On April 16, 1962, Lawrence Houston, CIA General Counsel, met with Miller.² Houston reported to Edwards that Miller envisioned "no major difficulty in stopping action for prosecution." Houston offered to brief the Attorney General, but said that he "doubted if we would want to give the full story to anyone else in the Department," and Miller did not desire to know the "operational details." On April 20 Houston told Miller's first assistant that he was requesting Justice not to prosecute "on grounds of security," and asked to be informed if it was necessary to brief the Attorney General. (Memo, Houston to Edwards, 4/26/62)

In the latter half of April 1962 William Harvey, head of the CIA's anti-Castro effort, gave poison pills to Roselli for use in the post-Bay of Pigs assassination effort against Fidel Castro using underworld figures.

(b) *Briefing of the Attorney General on May 7, 1962.*

An entry in Attorney General Kennedy's calendar for May 7, 1962, states "1:00—Richard Helms."³ At 4:00 the Attorney General met

¹ This memorandum is peculiar in two respects. First, the CIA had already orally objected to prosecution on two occasions. Second, Hoover was quizzing the CIA on behalf of the Department of Justice, a task that would normally be performed by the Department's Criminal Division.

² Houston testified that he did not remember these meetings. (Houston, 6/2/73, p. 3) Miller recalled only that Houston had spoken to him about a wiretap and possible CIA embarrassment. (Miller, 11/73, p. 16)

³ Helms testified that he did not recall meeting with the Attorney General on May 7 and his desk book does not reflect any such meeting. When asked if he had ever met with the Attorney General to set up a knowingly inaccurate briefing, Helms testified that he had not and that if he had, he would certainly remember it because "I would have been consulting or colluding, and I have no recollection of ever having done anything like that." (Helms, 9/16/73, p. 8)

Probers Doubt Kennedy Knew of Poison Plot Against Castro

By Laurence Stern

Senate Intelligence investigators pursued a bizarre White House episode which raised the possibility — now fully discounted — that President Kennedy may have learned of CIA plans to poison Fidel Castro from a woman friend of top underworld figures. The highly sensitive investigation by the Senate Intelligence committee will be alluded to briefly in the report on the CIA's involvement in plans to assassinate foreign leaders. The report is scheduled for release Thursday.

The investigation centered on a 1960 Kennedy campaign volunteer, then known as

Judith Campbell, who became the subject of top-priority concern to the late FBI Director J. Edgar Hoover because of her association with crime figures John Roselli and the late Sam Giancana. Both men were involved in the CIA's plot to poison Castro.

Campbell's role in the episode was heightened by the fact that she frequently telephoned the Kennedy White House. Investigators found evidence of some 70 phone calls from her during an 11-month period in the log of former presidential secretary Evelyn Lincoln on file in the Kennedy Library.

Lincoln told the Senate Intelligence committee that Campbell was a volunteer in the California campaign and

had met the President there. She said she could not recall that the former campaign worker ever visited the President in the White House or elsewhere after the 1960 election.

Campbell gave the committee a deposition saying that she never knew of the poison plot from Giancana, Roselli or anyone else. From the standpoint of the investigation into assassination schemes directed against foreign leaders this meant the entire Campbell episode was irrelevant to the committee's inquiry.

"We were not investigating President Kennedy's personal associations," said one ranking member of the investigating panel.

Campbell's calls to the

White House — usually logged into Lincoln's office — began on March 23, 1961, from the caller's Los Angeles residence. Many were described in the investigative files of the staff as "Campbell-JFK calls."

The files indicate that several of Campbell's calls to the White House were made from the Oak Park, Ill., residence of Giancana. At times, however, she would call from the Mayflower Hotel in Washington.

FBI Director Hoover, who was aware of the CIA's involvement with Giancana in anti-Castro operations, sent memos in February, 1962, to Attorney General Robert F. Kennedy and White House chief of staff Kenneth O'Donnell alerting them to the

potentially embarrassing range of Campbell's social acquaintances.

Hoover then submitted a memo on Campbell directly to President Kennedy and met with him for lunch on March 22, 1962. There is no record of the discussion. Close former aides to the President recall no mention of it.

Lincoln said she also received a copy of the first memo and at that point Campbell's calls were no longer accepted at the White House.

The committee decided unanimously to take a low-key approach to the Campbell episode, some members feeling that it would be more appropriate to ignore it as irrelevant to presidential awareness of the Castro

assassination schemes.

"We decided to allude to it in order to avoid any suggestion that we were playing favorites with some administrations," said one well-informed committee source.

Senate Intelligence committee staff logs which came into the possession of The Washington Post indicate that Hoover sent a memo to then CIA Deputy Director for Plans (covert operations) Richard Bissell on Oct. 18, 1960, recording his awareness of Giancana's involvement in the Castro poison plot.

By January, 1961, Bissell was discussing an "executive action" — believed to be the Castro assassination plan — with two other high-level CIA officials. They were Sidney Gottlieb, who became chief of

the technical services division in charge of the agency's drug experimentation program, and William Harvey, a senior case officer for underworld recruits.

The same month Bissell is recorded as having briefed McGeorge Bundy, then the President's national security affairs adviser, on the executive action.

Also in January, 1961, the new President began receiving intensive briefings from then CIA Director Allen Dulles on the Bay of Pigs invasion plan.

That month of the Kennedy inauguration the new Attorney General undertook a coordinated investigation by federal and local agencies into the affairs of Giancana, who the CIA had recruited for the

attempt on Castro's life.

It could not be determined when Attorney General Kennedy first learned of Giancana's dual role as target of damage case prosecution and an underworld agent in the pay of the CIA.

But by April, 1961, prior to the Bay of Pigs invasion — there is evidence in the committee's files that transmission of the materials toward its political target had begun.

Nonetheless, the committee could not determine when President Kennedy learned of the CIA recruitment of underworld figures, who were involved in re-establishing their base in Havana, for assassination attempts on Castro.

OF DAN THOMASSON AND TIM WYNGAARD

SCRIPPS-HOWARD STAFF WRITERS

WASHINGTON, Nov. 18 -- THE LATE PRESIDENT JOHN F. KENNEDY'S CLOSE ASSOCIATION WITH A WOMAN WHO HAD STRONG TIES TO TOP UNDERWORLD FIGURES CAUSED GREAT CONCERN TO THEN-FBI DIRECTOR J. EDGAR HOOVER; BUREAU DOCUMENTS DISCLOSE.

THE ASSOCIATION HAS COME TO LIGHT THROUGH THE SENATE INTELLIGENCE COMMITTEE'S EFFORTS TO DETERMINE WHETHER KENNEDY WAS AWARE OF THE CENTRAL INTELLIGENCE AGENCY'S USE OF THESE SAME UNDERWORLD FIGURES IN TRYING TO ASSASSINATE CUBAN PREMIER FIDEL CASTRO.

THE FBI DOCUMENTS NOW IN THE HANDS OF THE SENATE COMMITTEE SHOW THE PRESIDENT'S ASSOCIATIONS WITH THE WOMAN TOOK PLACE ON NUMEROUS OCCASIONS AT VARIOUS PLACES ACROSS THE COUNTRY IN 1961 AND 1962; WHILE THE KENNEDY ADMINISTRATION WAS LAUNCHING A HIGHLY PUBLICIZED WAR ON ORGANIZED CRIME.

THE WOMAN, WHO IS REPRESENTED BY THE WASHINGTON LAW FIRM OF R. SARGENT SHRIVER, KENNEDY'S BROTHER-IN-LAW, HAS APPEARED IN CLOSED-DOOR SESSIONS BEFORE THE SENATE COMMITTEE TO ANSWER QUESTIONS ABOUT HER TIES TO KENNEDY, HIS LATE BROTHER, ROBERT, AND MOBSTERS JOHN ROSELLI AND SAM GIANCANA, RECENTLY SLAIN CHICAGO MAFIA LEADER.

THE COMMITTEE'S INTERROGATION OF JUDITH CAMPBELL, WHO NOW LIVES IN CALIFORNIA UNDER A DIFFERENT NAME, WAS AIMED AT DETERMINING WHETHER SHE KNEW AND HAD TOLD KENNEDY ABOUT THE CIA'S USE OF ROSELLI AND GIANCANA IN ATTEMPTS TO ASSASSINATE CASTRO.

THE INTELLIGENCE PANEL'S DEMOCRATIC MAJORITY HAS DISCOUNTED THE POSSIBILITY THAT KENNEDY LEARNED ABOUT THE CIA'S USE OF THE MAFIA IN ITS CASTRO PLOT THROUGH THE WOMAN. THE COMMITTEE HAS DECIDED TO GLOSS OVER THE "CAMPBELL MATTER" WITH A MERE ALLUSION IN ITS FORTHCOMING REPORT TO THE SENATE ON CIA ASSASSINATION PLOTS.

SOME COMMITTEE MEMBERS BELIEVE THE PANEL'S INVESTIGATORS FAILED TO PURSUE THE MATTER FAR ENOUGH; PARTICULARLY SINCE THE COMMITTEE'S RECORDS SHOW SOME OF 80 TELEPHONE CALLS THE WOMAN PLACED OVER 34 WEEKS TO KENNEDY'S PRIVATE NUMBER IN THE WHITE HOUSE ORIGINATED FROM GIANCANA'S CHICAGO-AREA HOME.

COMMITTEE INVESTIGATORS DID LEARN THE WOMAN WAS WITH THE PRESIDENT IN FLORIDA WHEN THE CIA ALLEGEDLY DELIVERED POISON PELLETS TO ROSELLI FOR USE AGAINST CASTRO.

THE FLORIDA TRIP WAS ONE OF A NUMBER THE WOMAN MADE TO MEET WITH KENNEDY IN PALM BEACH AND OTHER AREAS TO WHICH HE TRAVELLED.

EVELYN LINCOLN, KENNEDY'S PRIVATE SECRETARY, APPEARED BEFORE THE COMMITTEE IN SECRET SESSION AND TESTIFIED, ACCORDING TO SOURCES, THAT SHE ASSUMED THE WOMAN WAS A CAMPAIGN WORKER FOR KENNEDY.

JUDITH CAMPBELL REPORTEDLY WAS A VOLUNTEER WORKER IN THE PRESIDENT'S 1960 CAMPAIGN IN CALIFORNIA. SHE REPORTEDLY TESTIFIED TO COMMITTEE INVESTIGATORS THAT HER VISITS WITH KENNEDY AROUND THE COUNTRY WERE ARRANGED THROUGH MRS. LINCOLN.

EFFORTS TO REACH HER WERE UNSUCCESSFUL ALTHOUGH A MAN CLAIMING TO BE HER HUSBAND REFERRED SCRIPPS-HOWARD NEWS SERVICE TO HER ATTORNEY, HENRY A. HUSSCHMAN, A MEMBER OF SHRIVER'S FIRM. EFFORTS TO REACH HUSSCHMAN ALSO FAILED.

A CALIFORNIA ADDRESS AND TELEPHONE NUMBER FOR THE WOMAN HELD BY THE COMMITTEE PRODUCED ONLY A STATEMENT FROM AN UNIDENTIFIED WOMAN THAT JUDITH CAMPBELL AND HER HUSBAND RECEIVED ALL MAIL AND TELEPHONE CALLS THERE; BUT LIVE ELSEWHERE.

COMMITTEE SOURCES SPECULATED THAT JUDITH CAMPBELL AND HER HUSBAND HAVE "GONE UNDERGROUND" IN FEAR OF RETALATION FROM THE UNDERWORLD. GIANCANA WAS FOUND SHOT TO DEATH IN HIS OAK PARK, ILL., HOME LAST

(MORE)

EXHIBIT "3"

JUNE SHORTLY AFTER BEING SUBPOENAED BY THE COMMITTEE.

HOOVER BECAME DISTURBED WHEN HE BEGAN GETTING REPORTS ON JUDITH CAMPBELL'S TIES TO THE UNDERWORLD FROM FIELD AGENTS; WHO ALSO WARNED THAT THE WOMAN WAS CLOSE TO KENNEDY.

HOOVER THEN BEGAN OBTAINING AS MUCH INFORMATION AS POSSIBLE ABOUT HER AND LATER PREPARED A MEMORANDUM FOR A MEETING WITH THE PRESIDENT WHICH TOOK PLACE REPORTEDLY ON MARCH 2, 1962.

BUREAU SOURCES SAID HOOVER PARTICULARLY WAS CONCERNED THAT SOMEONE WITH JUDITH CAMPBELL'S ASSOCIATIONS SHOULD HAVE SUCH ACCESS TO THE PRESIDENT; ESPECIALLY IN LIGHT OF KENNEDY'S PUBLIC PLEDGE TO DESTROY ORGANIZED CRIME. ATTORNEY GENERAL ROBERT F. KENNEDY ALSO KNEW OF THE ASSOCIATION; ACCORDING TO COMMITTEE SOURCES.

THE COMMITTEE REPORT TO BE RELEASED HERE THURSDAY WILL DRAW NO CONCLUSIONS ABOUT WHAT KENNEDY MIGHT HAVE KNOWN ABOUT THE ASSASSINATION PLOTS AGAINST CASTRO AND OTHERS. THE REFERENCE TO JUDITH CAMPBELL WILL STATE MERELY THAT THE PANEL HAS IDENTIFIED A "PERSON" WHO HAD ASSOCIATIONS WITH KENNEDY AND GIANCANA AND ROSELLI.

RHR

11-18-75

(STEIF)

BY SCRIPPS-HOWARD NEWS SERVICE

RAMBOUILLET, FRANCE, Nov 18 -- THE CONCRETE RESULTS OF THE SIX-NATION ECONOMIC SUMMIT HERE WILL DEPEND ON WHAT THE LEADERS AND THEIR NATIONS DO IN THE COMING MONTHS.

PRESIDENT FORD RETURNS TO A RECALCITRANT CONGRESS AND HIS ELECTION CAMPAIGN.

FRENCH PRESIDENT VALERY GISCARD D'ESTAING RESUMES HIS ATTEMPTS TO FORESTALL DISASTROUS STRIKES.

NEXT GERMAN PRESIDENT HELMUT SCHMIDT FACES A TOUGH 1976 POLITICAL CAMPAIGN.

GREAT BRITAIN'S PRIME MINISTER HAROLD WILSON RETURNS TO THE INFLATION AND MISERABLE IMBALANCE OF TRADE THAT ARE CRIPPLING HIS COUNTRY.

ITALIAN PRIME MINISTER ALDO MORO IS TRYING TO HOLD OFF THE COMMUNISTS.

EVEN JAPAN'S PRIME MINISTER TAKEO MIKI HAS A CRISIS -- HIS FINANCE MINISTER LEFT HERE A DAY EARLY TO COPE WITH A PARTY REVOLT IN THE JAPANESE DIET.

DID THEY ACCOMPLISH ANYTHING IN THEIR TALKS HERE?

THE ANSWER PROBABLY SHOULD BE A QUALIFIED "YES".

THEY KNOW EACH OTHER BETTER. PSYCHOLOGICALLY; THEY'RE BETTER ATTUNED. THEY MAY UNDERSTAND EACH OTHER'S PROBLEMS A LITTLE BETTER.

THE AMERICANS AND FRENCH SIGNED A SECRET PACT TO HELP STABILIZE SHARP FLUCTUATIONS IN THE VALUE OF THE DOLLAR; ALTHOUGH THE UNITED STATES DID NOT GIVE UP THE FAVORABLE FLOAT -- THE FREE MARKET RATE -- FOR THE DOLLAR. THE FRENCH; WEDDED TO THE IDEA OF FIXED EXCHANGE RATES; RECEIVED AMERICAN PROMISES OF MORE FREQUENT CONSULTATION ON CURRENCY EXCHANGES USING A STILL SECRET "MECHANISM" THAT IS PART OF THE AGREEMENT.

(MORE)

Senate report links woman, JFK, mob

'Close friend' identified

By Robert Sigler
Of Our Washington Bureau

WASHINGTON — A person who Senate investigators said was a "close friend" of President John F. Kennedy as well as known underworld figures has been identified as a woman who first met Kennedy during his 1960 campaign in California.

The Senate Intelligence committee, in its report released this week, referred to a "close friend" of Kennedy but did not identify the person by name or sex.

HIGHLY reliable sources, however, identified this friend as a Judith Campbell, and said she first became acquainted with Kennedy and Kennedy's close associates in California during the campaign.

The report outlined in some detail the woman's association not only with Kennedy but also with known underworld figures who were involved in CIA dirty tricks in Cuba.

THE RELEVANT portion of the report is this:

"Evidence before the committee indicates that a close friend of President Kennedy had frequent contact with the President from the end of 1960 through mid-1962. FBI reports and testimony indicate that the President's friend was also a close friend of John Roselli and Sam Giancana and saw them often during this same period."

Both Roselli and Giancana were widely known underworld figures who were recruited by the CIA, through an intermediary, to work on plots to assassinate Cuban Prime Minister Fidel Castro.

Giancana was shot to death last June at his home in Oak Park, a western suburb of Chicago.

Kennedy's association with Campbell became a matter of

Turn to Page 4, Column 1

Large Daily News

Senate committee report links JFK, woman, mobsters

Continued from Page 1

great concern to J. Edgar Hoover, the FBI director at the time. On Feb. 22, 1962, Hoover sent a memorandum to the President's brother, Robert F. Kennedy, and an identical copy to Kenneth O'Donnell, special assistant to President Kennedy, detailing some of the FBI's information about Campbell.

According to the Senate report, "The memorandum stated that information developed in connection with a concentrated FBI investigation of John Roselli revealed that Roselli had been in contact with the President's friend."

"The memorandum also reported that the individual was maintaining an association with Sam Giancana, described as 'a prominent Chicago underworld figure.'"

"Hoover's memorandum," the Senate report continued, "also stated that a review of the telephone toll calls from the President's friend's residence revealed calls to the White House. The President's secretary ultimately received a copy of the memorandum and said she believed she would have shown it to the President."

WHITE HOUSE TELEPHONE LOGS show there were 70 "instances of phone contact" between the White House and Campbell, the report said, still referring to her as the President's friend. The report adds that testimony by her before the committee "confirms frequent phone contact with the President himself."

On March 22, Hoover, fully briefed on Campbell's reported associations, met with President Kennedy for a private luncheon. Within a few hours, the report said, the White House logs recorded the last telephone contact between Campbell and the White House.

The report does not say who initiated the call.

The committee said there was no record of what subjects were discussed by Hoover and Kennedy. But it makes a "presumption" that Campbell was "one topic" of the conversation.

This presumption raised the possibility that Hoover may have told Kennedy of Giancana's involvement in CIA plots that included assassinating Castro, the committee said.

"What actually transpired at that luncheon may never be known, as both participants are dead and the FBI files contain no records relating to it," the report said. It added that Kennedy met afterward with "most CIA officials witting of the assassination plot" but that these officials have since testified that the President never asked them about it.

The day after the luncheon, Hoover initiated steps that eventually led to a Justice Department decision to forgo prosecution of Giancana and Roselli because the CIA feared the roles of the two mob figures in the assassination plots would be exposed.

IN A REPORT FROM WASHINGTON earlier this week outlining some of these details, the Scripps-Howard Newspapers said Campbell is now living in California under an assumed name, perhaps in fear of retaliation from the underworld.

Efforts to reach the woman were unsuccessful. Her attorney, Henry A. Hubschman, told The Chicago Daily News. "I have no comment to offer at this time." Hubschman works in the Washington law firm of Sargent Shriver. Shriver is married to Eunice Kennedy, a sister of the late President, and is a candidate for the Democratic presidential nomination.

Committee spokesmen would not comment either, although there were reports that some committee members believed the panel's investigators failed to pursue the Campbell matter far enough.

TWO OF President Kennedy's closest associates at the time were willing to discuss the report. In a telephone interview from his office in Boston, O'Donnell, who was Kennedy's appointments secretary, said, "I think the thing is totally out of context. I feel very strongly about it."

O'Donnell acknowledged that he had seen the memo referred to in the report and that the Senate committee had interviewed him. He also said he does not deny the fact that Campbell made telephone calls to the White House.

Evelyn Lincoln, who was Kennedy's personal secretary, remembers both Campbell and the telephone calls. "She was a volunteer in California," Mrs. Lincoln said in a telephone interview. "I knew of her during that time just like I knew of other volunteers in other states."

Mrs. Lincoln continued, "The President was right attractive and lots of girls used to call him."

Campbell eventually telephoned the White House so many times that "she got like a pest," Mrs. Lincoln said. "She would call and call and call."

BUT BOTH MRS. LINCOLN and O'Donnell said Campbell's telephone calls were never put through to Kennedy. And they both insisted he had no "private line" on which he could have received a call.

Mrs. Lincoln and O'Donnell said they remember the memorandum that Hoover sent in which the woman's reported associations with underworld figures and Kennedy were outlined.

According to the Senate report, "The President's secretary (Mrs. Lincoln) ultimately received a copy of the memorandum and said she believed she would have shown it to the President."

But O'Donnell said "I never showed it (the memo) to the President. I thought it was so innocuous. . . . I was allegedly in charge of the White House. Every day I got memos. I probably got 500 a day. . . ."

He said he never referred memos of such a nature to Kennedy, although he would not have held back on a memo dealing with a subject such as national security.

MRS. LINCOLN REMEMBERS that "a memo from the FBI came across my desk saying she (Campbell) had a connection with the mafia. At the very moment when I saw that, I stopped receiving her calls."

Mrs. Lincoln said she saw the memorandum in March, 1962, and that, as she remembers it, Campbell's associations with underworld figures were "pretty well identified."

O'Donnell said the Hoover-Kennedy luncheon that report discusses was held at the request of Robert F. Kennedy. When Hoover came to the White House, O'Donnell said he "presented me with a book on Communist infiltration of the United States."

After an hour or so, "the President came back . . . and told me 'Don't do it again,'" O'Donnell said.

STATEMENT

Recent articles by the Scripps-Howard syndicate, Chicago Daily News, New York Times and other papers have inferred that I was a go-between for the Mafia and/or C.I.A. with President John F. Kennedy in connection with the Castro assassination plots. Despite assurances to the contrary by Senator John Tower, portions of my closed session testimony before the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities have been leaked and distorted so as to implicate me in these bizarre assassination conspiracies between the underworld and government entities. These distortions have unnecessarily intruded into my right of privacy and seriously affected both my personal relationships and health.

I will not allow the Committee to implicate me in these absurd plots nor will I allow Evelyn Lincoln or Kenny O'Donnell to sulley or distort my personal relationship with Jack Kennedy. Until now I have refused numerous offers to publish the facts concerning my relationships with Jack Kennedy, Sam Giancana and Johnny Roselli, but the leaks by the Committee and the distortions by Evelyn Lincoln and Kenny O'Donnell have forced me to reveal the truth so as to lay to rest the wild-eyed speculation which now exists.

The full facts have been transcribed, documented and placed in a secure storage; they will be released at a proper time and in a proper manner. However, I can at this time emphatically state that my relationship with Jack Kennedy was of a close, personal nature and did not involve conspiratorial shenanigans of any kind. I originally met Jack Kennedy in early February 1960 in Las Vegas. We were introduced by a mutual friend. I was introduced to Sam Giancana by the same friend at a party in Miami Beach in late March 1960. I will not, at this time, reveal the identity of that friend, but will do so when the entire story is told. Johnny Roselli and I were introduced by Sam Giancana sometime after March 1960. Jack Kennedy and I last talked in late 1962. My last conversation with Sam Giancana was approximately late 1964. Despite information to the contrary, I did not place telephone calls to the White House from Sam's Chicago home at any time. My relationship with Sam Giancana and my friendship with Johnny Roselli were of a personal nature and in no way related to or affected my relationship with Jack Kennedy nor did I discuss either of them with the other.

Both Evelyn Lincoln and Kenny O'Donnell were fully aware of the nature of my relationship with Jack Kennedy and their statements to the effect that I was a "campaign worker for Kennedy" are entirely contrived. During the period in which I was involved with Jack Kennedy, the F.B.I. carried

out a top priority investigation of me which resulted in substantial harrassment. The portions of the F.B.I. file on me which were read during my session in the Committee shocked me. Their investigation was prying, insidious and sounded more like a scandal sheet than a governmental investigation. The information quoted was both incorrect and speculative. I fully intend to demand my rights as a citizen to see those F.B.I. files and also the testimony given by me before the Committee, which, by their own rules, I should have already been given the opportunity to inspect. I have not "gone underground" as alleged in the newspaper reports. I have changed my name but don't feel that is particularly unusual when one marries. Because of my lack of information of underworld activities, I do not feel I have anything to fear from the underworld. It was only when statements were made inferring that I had such knowledge that I became concerned for my safety.

DATE: December 17, 1975.

JUDITH KATHERINE (CAMPBELL) EXNER

ACKNOWLEDGMENT OF SERVICE

Receipt of a copy of the Affidavit of Judith Katherine Exner In Support of Plaintiff's Motion for an Ex Parte Order is hereby acknowledged this 19th day of February, 1976.

By

John W. Bernice

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By Pat W. Borne

1 RICHARD C. LEONARD
Attorney at Law
2 2404 Wilshire Boulevard
Suite 400
3 Los Angeles, CA 90057
4 (213) 380-3330
5 Attorney for Plaintiff

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

11 JUDITH K. EXNER,) No. 76-89-S
12 Plaintiff,) SUBSTITUTION OF ATTORNEY
13 -vs-)
14 FEDERAL BUREAU OF INVESTIGATION,)
et al.,)
15 Defendants.)
16

17
18 Judith K. Exner, plaintiff, hereby substitutes Richard
19 C. Leonard, 2404 Wilshire Boulevard, Suite 400, Los Angeles,
20 California 90057, telephone (213) 380-3330, as attorney of record
21 in place and stead of Brian D. Monaghan.

22 DATED: _____
23 JUDITH K. EXNER

24 I consent to the above substitution.

25 DATED: February 11, 1976.
26 BRIAN D. MONAGHAN

27 I am duly admitted to practice in
28 this district.

29 Above substitution accepted

30 DATED: February 11, 1976.
31 RICHARD C. LEONARD

32 EXHIBIT "1"

1 Approved:

2 UNITED STATES DISTRICT JUDGE

3
4 Note: Please check appropriate box to indicate whether new

5 counsel was: ☐ retained or, ☐ appointed by the Court.
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1 RICHARD C. LEONARD
2 Attorney at Law
3 2404 Wilshire Boulevard
4 Suite 400
5 Los Angeles, CA 90057

6 (213) 380-3330

7 Attorney for Plaintiff

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 JUDITH KATHERINE EXNER,

12 Plaintiff,

13 -vs-

14 FEDERAL BUREAU OF INVESTIGATION,
15 et al.,

16 Defendants.

) CIVIL ACTION NO. 76-89-S
)

) AFFIDAVIT OF DANIEL R. EXNER
) RE SUBSTITUTION OF ATTORNEY

17
18 STATE OF CALIFORNIA)

) ss:

19 COUNTY OF LOS ANGELES)

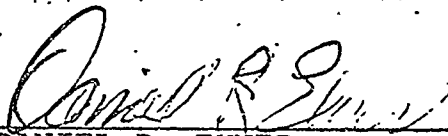
20 Daniel R. Exner, being first duly sworn, deposes and
21 states that:

22 1. I am the husband of Judith Katherine Exner, plain-
23 tiff in the above-captioned litigation. Along with my wife, on
24 December 13, 1975, I retained Brian D. Monaghan, Esq., to repre-
25 sent me in connection with certain legal matters.

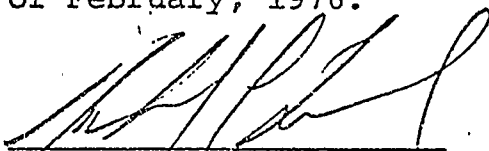
26 2. I became dissatisfied with Mr. Monaghan's represen-
27 tation, and on Sunday, February 8, 1976, I telephoned Mr. Monaghan,
28 with my wife's consent, and advised him that he was being termi-
29 nated as our attorney. I told him that he should take no further
30 steps in connection with any legal matter, and that he should
31 wait to hear from our new attorney, Richard C. Leonard, Esq.,
32 who would be contacting him shortly. I confirmed my February 8,

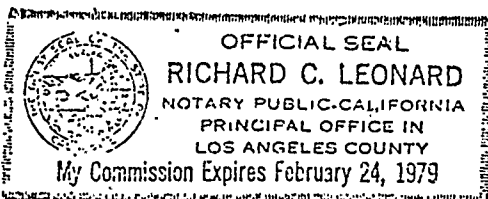
1 1976, telephone conversation with Mr. Monaghan in a letter to
2 him dated February 9, 1976. A copy of that letter is attached
3 as Exhibit "1" to the Affidavit of Judith Katherine Exner, filed
4 concurrently herewith.

5 3. It is my desire to discharge Mr. Monaghan as my
6 attorney and to be represented by Richard C. Leonard, Esq. The
7 complaint filed by Mr. Monaghan on Monday, February 9, 1976, was
8 filed after he was terminated, and without my authority or my
9 wife's authority.

10
11 
12 DANIEL R. EXNER

13 SUBSCRIBED AND SWORN to
14 before me this 13th day
15 of February, 1976.

16 
17 Notary Public



1 RICHARD C. LEONARD
2 Attorney at Law
3 2404 Wilshire Boulevard
4 Suite 400
5 Los Angeles, CA 90057

6 (213) 380-3330

7 Attorney for Plaintiff

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 JUDITH KATHERINE EXNER,

11 Plaintiff,

12 -vs-

13 FEDERAL BUREAU OF INVESTIGATION,
14 et al.,

15 Defendants.

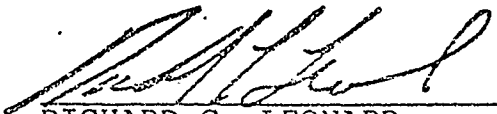
) CIVIL ACTION NO. 76-89-S

) EX PARTE MOTION RE SUBSTI-
) TUTION OF ATTORNEY; AFFI-
) DAVITS OF JUDITH KATHERINE
) EXNER, DANIEL R. EXNER, AND
) RICHARD C. LEONARD

16
17 Plaintiff Judith Katherine Exner hereby moves the Court
18 for an order permitting the substitution of Richard C. Leonard,
19 Esq., 2404 Wilshire Boulevard, Suite 400, Los Angeles, California
20 90057, (213) 380-3330, a member of the Bar of this Court, as her
21 attorney of record, in place and instead of Brian D. Monaghan.

22 This motion is based on all of the files and records
23 in this action, and on the Affidavits of Judith Katherine Exner,
24 Daniel R. Exner, and Richard C. Leonard, which are filed con-
25 currently with this motion.

26 DATED: February 19, 1976.

27
28 
29 RICHARD C. LEONARD
30
31
32

1 RICHARD C. LEONARD
2 Attorney at Law
3 2404 Wilshire Boulevard
Suite 400
Los Angeles, CA 90057

4 (213) 380-3330

5 Attorney for Plaintiff

6
7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 JUDITH KATHERINE EXNER,) CIVIL ACTION NO. 76-89-S
12 Plaintiff,)
13 -vs-) AFFIDAVIT OF JUDITH KATHERINE
14 FEDERAL BUREAU OF INVESTIGATION,) EXNER RE SUBSTITUTION OF
et al.,) ATTORNEY
15 Defendants.)
16

17
18 STATE OF CALIFORNIA)
19) ss:
COUNTY OF LOS ANGELES)

20 Judith Katherine Exner, being first duly sworn, deposes
21 and states that:

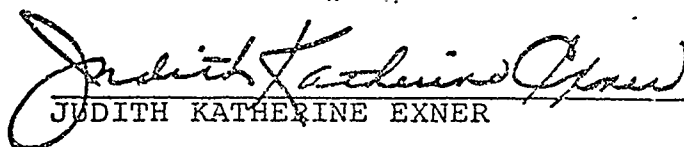
22 1. I am the plaintiff in the above-entitled action.
23 On December 13, 1975, I and my husband, Daniel Exner, entered
24 into a retainer agreement with Brian D. Monaghan, Esq., to repre-
25 sent me and my husband in various matters, including but not
26 limited to the filing of a lawsuit against the Federal Bureau of
27 Investigation.

28 2. In recent weeks, I had become dissatisfied with
29 Mr. Monaghan's representation of me. On Sunday, February 8, 1976,
30 my husband, in my presence and with my consent, telephoned
31 Mr. Monaghan and informed him that I was discharging him as my
32 attorney, and that I wanted him to take no further actions on my

1 behalf. I confirmed the telephone conversation of February 8,
2 1976, to Mr. Monaghan in a letter, signed both by me and by my
3 husband, dated February 9, 1976. Attached hereto as Exhibit "1",
4 in a sealed envelope, is a copy of that February 9, 1976, letter.
5 I request that the Court reseal the letter after reviewing it
6 because of the confidential nature of certain of the information
7 contained therein, as well as in Exhibit "2" to this Affidavit.

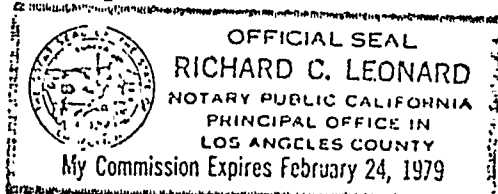
8 3. On February 11, 1976, I received a letter from
9 Mr. Monaghan dated February 9, 1976. In that letter, Mr. Monaghan
10 indicated that he had filed the above-captioned lawsuit on my
11 behalf. Apparently, the litigation was filed after Monaghan had
12 been discharged and was told not to proceed with the litigation.
13 In his February 9, 1976, letter, Mr. Monaghan indicated that he
14 was willing to have my new attorney, Richard C. Leonard, Esq.,
15 substitute in for him at any time with an appropriate pleading.
16 A copy of the February 9, 1976, letter from Monaghan is attached
17 hereto as Exhibit "2" and incorporated herein by this reference.

18 4. It is my desire to have Richard C. Leonard, Esq.,
19 represent me in my action against the Federal Bureau of Investi-
20 gation and others in place and instead of Brian D. Monaghan, Esq.
21 It is also my desire to have Mr. Leonard file an amended complaint
22 in this action to accurately reflect the relief I am requesting.

23
24 
25 JUDITH KATHERINE EXNER

26 SUBSCRIBED AND SWORN to before me
27 this 18 day of February, 1976.

28
29 
30 Notary Public



1 RICHARD C. LEONARD
2 Attorney at Law
3 2404 Wilshire Boulevard
4 Suite 400
5 Los Angeles, CA 90057
6
7 (213) 380-3330

8 Attorney for Plaintiff

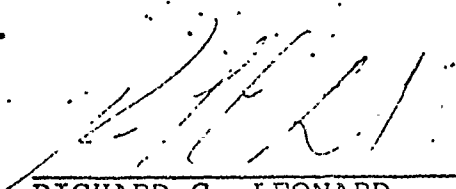
9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA

11 JUDITH KATHERINE EXNER,) CIVIL ACTION NO. 76-89-S
12 Plaintiff,) NOTICE OF HEARING ON EX PARTE
13 -vs-) MOTION
14 FEDERAL BUREAU OF INVESTIGATION,)
15 et al.,)
16 Defendants.)

17
18 TO DEFENDANTS AND TO JOHN R. NEECE, CHIEF, CIVIL
19 DIVISION, UNITED STATES ATTORNEY'S OFFICE, THEIR ATTORNEY:

20 PLEASE TAKE NOTICE that the hearing on Plaintiff's
21 Ex Parte Motion for an Order: (1) Requiring the Government to
22 Respond to the Amended Complaint by March 1, 1976; (2) Requiring
23 the Government to Produce the FBI Files Relating to Plaintiff for
24 the Court's In Camera Inspection by March 1, 1976; and (3) Shorten-
25 ing Time to Serve and File a Notice of Motion and Motion for
26 Summary Judgment will be brought on for hearing before the
27 Honorable Edward J. Schwartz, United States District Judge, on
28 February 23, 1976, at 9:30 a.m.

29 DATED: February , 1976.

30
31 
32 RICHARD C. LEONARD

ACKNOWLEDGMENT OF SERVICE

Receipt of a copy of the Notice of Hearing on Ex Parte
Motion is hereby acknowledged this ____ day of February, 1976.

By _____

1 RICHARD C. LEONARD
Attorney at Law
2 2404 Wilshire Boulevard
Suite 400
3 Los Angeles, CA 90057
4 (213) 380-3330
5 Attorney for Plaintiff
6
7

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
10

11 JUDITH KATHERINE EXNER,) CIVIL ACTION NO. 76-89-S
12 Plaintiff,) AFFIDAVIT OF RICHARD C. LEONARD
13 -vs-) RE SUBSTITUTION OF ATTORNEY
14 FEDERAL BUREAU OF INVESTIGATION,)
et al.,)
15 Defendants.)
16

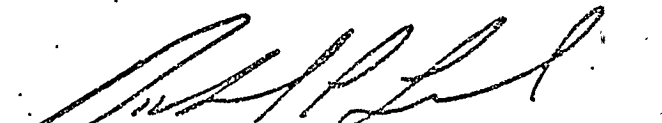
17
18 STATE OF CALIFORNIA)
19) ss:
COUNTY OF LOS ANGELES)

20 Richard C. Leonard, being first duly sworn, deposes
21 and states that:

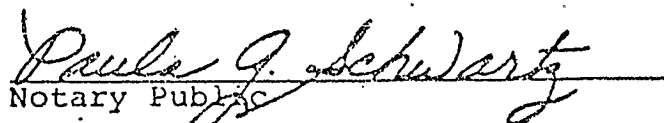
22 1. I am an active member of the State Bar of California,
23 and I am admitted to practice before this Court. I have been
24 retained by Daniel R. and Judith Katherine Exner to represent
25 them in various legal matters, including litigation against the
26 Federal Bureau of Investigation and others under the Freedom of
27 Information Act and the Privacy Act of 1974.

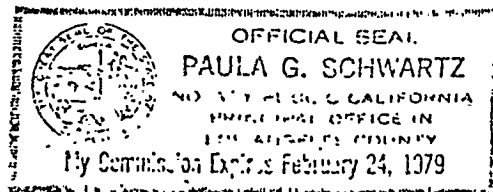
28 2. On Wednesday, February 11, 1976, I met with Brian D.
29 Monaghan, Esq., and with Edgar Paul Boyko, Esq., (who advised me
30 that he was acting as Mr. Monaghan's attorney). The purpose of
31 that meeting was to have Mr. Monaghan sign a Substitution of
32 Attorney's form in this litigation, and to have Mr. Monaghan

1 transfer his files and records relating to Mr. and Mrs. Exner to
2 me. At that meeting, Mr. Monaghan confirmed what I had been told
3 by Mr. and Mrs. Exner, to wit: that he had been telephonically
4 advised that he was discharged as the Exners' attorney on Sunday,
5 February 8, 1976, and that on February 11, 1976, he received a
6 letter dated February 9, 1976, from the Exners confirming their
7 previous telephone conversation (a copy of that February 9, 1976,
8 letter from Mr. and Mrs. Exner to Mr. Monaghan is attached as
9 Exhibit "1" to the Affidavit of Judith Katherine Exner filed
10 concurrently herewith). At my February 11, 1976, meeting with
11 Messrs. Monaghan and Boyko, I presented a Substitution of Attorney
12 form to Mr. Monaghan for his signature. A copy of that Substi-
13 tution of Attorney form is attached hereto as Exhibit "1" and
14 incorporated herein by this reference. Mr. Monaghan refused to
15 sign the Substitution of Attorney form unless I was willing to
16 agree, on behalf of the Exners, to certain matters. I was not
17 willing to so agree. I informed Monaghan and Boyko that I felt
18 Monaghan had an obligation and a duty to sign the Substitution
19 of Attorney form, and that Monaghan had no right conditioning
20 his signing the Substitution of Attorney form upon any form of
21 agreement with the Exners. Mr. Monaghan continued in his refusal
22 to sign the Substitution of Attorney form.

23
24 
25 RICHARD C. LEONARD

26 SUBSCRIBED AND SWORN to before me
27 this 19th day of February, 1976.

28
29 
30 Notary Public



FEDERAL BUREAU OF INVESTIGATION
COMMUNICATIONS SECTION

Assoc. Dir. _____
Dep. A.D. Adm. _____
Dep. A.D. Inv. _____
Asst. Dir.: _____
Admin. _____
Comp. Syst. _____
Ext. Affairs _____
Files & Com. _____
Gen. Inv. _____
Ident. _____
Inspection _____
Intell. _____
Laboratory _____
Plan. & Eval. _____
Spec. Inv. _____
Training _____
Legal Coun. _____
Telephone Rm. _____
Director Sec'y _____

DIRECTOR, FBI

APR 1 1976

TO: ATTY; SA EARL J. BOWEN

OFFICE OF LEGAL COUNSEL

FROM: SAC, SAN DIEGO (100-176)

SUBJECT: JUDITH CAMPBELL FINER, aka
MURKIN ACT NUMBER

DE: [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

"TREAT AS ORIGINAL"

RL/News

ENCLOSURE

EX-116

REC-71 100-116113-13

17 MAY 6 1976

[Handwritten signature]

LEGAL COUNSEL

CARBON COPY DO NOT FILE

56 MAY 17 1976

File

3-24

*Send to
D.J. ASAP*

1 RICHARD C. LEONARD
2 Attorney at Law
3 2404 Wilshire Boulevard
4 Suite 400
5 Los Angeles, CA 90057
6
7 (213) 330-3330
8
9 Attorney for Plaintiff

10 UNITED STATES DISTRICT COURT
11
12 SOUTHERN DISTRICT OF CALIFORNIA

13 JUDITH KATHERINE EXNER,

14 Plaintiff,

15 -vs-

16 FEDERAL BUREAU OF INVESTIGATION,
17 et al.,

Defendants.

CIVIL ACTION NO. 75-89-S

ORDER

ENCLOSURE

62-110127-12

23 On Monday, March 15, 1976, the Court heard the plaintiff's
24 Motion for Partial Summary Judgment, by which motion plaintiff
25 sought, inter alia, an order requiring the defendants to: (1)
26 turn over to the Court for its in camera inspection the Federal
27 Bureau of Investigation [hereinafter "FBI"] files relating to the
28 plaintiff; and (2) pending the Court's review of the FBI files,
29 turn over those files to the plaintiff for her inspection pur-
30 suant to the Privacy Act of 1974. Richard C. Leonard appeared
31 on behalf of plaintiff, Judith Katherine Emer, and John H. Nam,
32 Assistant United States Attorney, and Chief, Civil Division,
33 appeared on behalf of defendants, the Federal Bureau of Investi-
34 gation; Clarence M. Kelly, Director of the FBI; the United
35 States Department of Justice; and Edward R. Levi, Attorney
36 General of the United States.

37 The Court, having considered plaintiff's moving papers

1 including the Affidavit of Judith Katherine Bremer, and plaintiff
2 memorandum of points and authorities, and after considering the
3 opposition to plaintiff's motion for partial summary judgment
4 filed by the defendants, and after hearing the argument of counsel
5 for the respective parties, and after due deliberation,

6 IT IS ORDERED as follows:

7 *Revised* Defendants, and each of them, shall file their
8 answers to the Amended Complaint for Injunctive Relief Under the
9 Privacy Act of 1974 and the Freedom of Information Act by April
10 12, 1976.

11 2. By April 12, 1976, the defendants, and each of them
12 shall file with the Court an affidavit or affidavits containing
13 the following information as described in Vaughn v. Rosen, 484
14 F.2d 820, 826-828 (D.C. Cir., 1973):

15 2.1) A statement whether the FBI has maintained

17 the containing information about the plaintiff.

18 2.2) If such file or files exist, a description
19 of the file or files maintained and/or possessed by the FBI
20 relating to the plaintiff. Said description shall include
21 the size of the file, which may be delineated either by the
22 number of documents, the total pages of documents, or the
23 dimensions of the file or files.

24 2.3) If such file or files exist, a description
25 or list of the documents contained in said file or files
26 which are not allegedly covered by any exemptions to the
27 Privacy Act of 1974 or the Freedom of Information Act, and
28 which therefore can be immediately turned over to the plain-
29 tiff for her review. If the Government contends that only
30 a portion of a document is exempt from disclosure, the
31 remaining portions of the document should be described so
32 that it may be disclosed to the plaintiff.

2.4 If such file or files exist, the defendants, by means of detailed description, must set forth any exemption or exemptions which they allege apply to any document or any portion of a document in the FBI files. The list of exemptions should be sufficiently detailed so that the Court can identify the documents or portions of documents to which the defendants are claiming a statutory exemption applies. The description should not be so detailed so as to contain information which compromises the secret nature of the documents; and, in this regard, excessive reference to the actual language of the documents should be avoided. In large documents, the defendants must specify, in detail, which portions of the documents are disclosable and which are allegedly exempt.

1. The defendants, and each of them, after filing the documents listed above, shall make arrangements to immediately make available to plaintiff those documents which are not allegedly protected by any exemption contained either in the Privacy Act of 1974 or in the Freedom of Information Act.

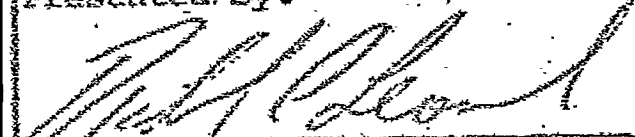
2. Until both the plaintiff and the Court have had an opportunity to review any documents disclosed to the plaintiff by the defendants, or any of them, the defendants shall not disclose to any other person or entity the contents of any of said documents, except for "routine use" as defined in 5 U.S.C. §552a(d)(7).

3. ~~Wherefore~~ ~~above~~, plaintiff's motion for partial summary judgment is denied.

DATED: 3/31/76

UNITED STATES DISTRICT JUDGE

Presented by:



RICHARD C. LEONARD
On Behalf of Plaintiff

1 The above form of Order is approved:

2
3
4 JOSEPH H. MURPHY, Assistant United
5 States Attorney, and Chief, Civil
6 Division, on Behalf of All Defendants

7 On and before the above order was
8 entered. The government motion to
9 proceed was granted allowing it to
10 additional it comply with the court
11 order.
12
13
14
15

UNITED STATES GOVERNMENT

Memorandum

TO : [REDACTED]

DATE: 6/14/76

FROM : Legal Counsel *[Signature]*

SUBJECT: JUDITH KATHERINE EXNER v.
FEDERAL BUREAU OF INVESTIGATION
(U.S.D.C., S. D. CALIF.)
CIVIL ACTION NO. 76-89-S

Assoc. Dir. _____
Dep. AD Adm. _____
Dep. AD Inv. _____
Asst. Dir.: _____
Adm. Serv. _____
Ext. Affairs _____
Fin. & Pers. _____
Gen. Inv. _____
Ident. _____
Inspection _____
Intell. _____
Laboratory *[Signature]*
Legal Coun. _____
Plan. & Eval. _____
Rec. Mgnt. *[Signature]*
Spec. Inv. _____
Training _____
Telephone Rm. _____

PURPOSE: Memorandum advises of the filing of the attached documents in captioned matter.

SYNOPSIS: United States District Court by its order of 4/20/76 commanded that this Bureau conduct expeditious processing of plaintiff's FOIA request. This order was appealed to the United States Court of Appeals (U.S.C.A.) for the Ninth Circuit. On May 26, 1976, the U.S.C.A. agreed to hear the appeal but refused to stay execution of the District Court's order. The attached documents, including an affidavit of Special Agent [REDACTED] Records Management Division, were filed 6/10/76.

RECOMMENDATION: None. For information.

PBM
4/1/76
APPROVED: _____
Assoc. Dir. _____
Dep. AD Adm. _____
Dep. AD Inv. *[Signature]*
Asst. Dir.: _____
Adm. Serv. _____
Ext. Affairs _____
Fin. & Pers. _____
Gen. Inv. _____
Ident. _____
Inspection _____
Intell. _____
Laboratory _____
Legal Coun. *[Signature]*
Plan. & Eval. *[Signature]*
Rec. Mgnt. *[Signature]*
Spec. Inv. _____
Training _____

Enclosure

- 1 - [REDACTED]
Attn: [REDACTED]
1 - Mr. Mintz
1 - IPAL Unit [REDACTED]

EPM:rme *[Signature]*
(4)

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5010-108

JUN 24 1976

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

FBI/DOJ

Memorandum to [REDACTED]

Re: Judith Katherine Exner v. Federal Bureau of Investigation
(U.S.D.C., S. D. CALIF.) Civil Action No. 76-89-S

b6
b7C

DETAILS: Plaintiff, who is suing under the FOIA for documents pertaining to herself, was formerly associated with organized crime figures John Roselli and Sam Giancana (deceased). She allegedly was introduced to former President John F. Kennedy through these individuals. On 4/20/75, the United States District Court ordered this Bureau to provide to plaintiff a detailed refusal justification statement. The Department of Justice agreed to take appeal to the U.S.C.A., 9th Circuit. The U.S.C.A. agreed to hear the appeal but refused to stay the execution of the District Court's order. The attached papers are in compliance with the District Court order and renews the motion to stay the District Court's proceedings. The affidavit, which was coordinated among Special Agent [REDACTED] Special Agent [REDACTED] Legal Counsel Division and Departmental Attorney Lynne K. Zusman, was completed in late afternoon 6/9/76. Arrangements made through Dulles Resident Agency for hand carrying by American Airlines pilot on flight which left at 10:05 a.m., 6/10/76, and picked up by Special Agent [REDACTED] San Diego Division.

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

HONORABLE EDWARD J. SCHWARTZ, JUDGE PRESIDING

JUDITH KATHERINE EXNER,

Plaintiff,

-VS-

FEDERAL BUREAU OF
INVESTIGATION, et al.,

Defendants.

No. 76-0089 S

MOTION TO STAY PENDING
COMPLETION OF REVIEW

REPORTER'S TRANSCRIPT

San Diego, California

April 12, 1976

NOT RECORDED

3 JUN 2 1976

REPORTED BY: [REDACTED] CSR No. 2990
Official Court Reporter

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2 - ENCLOSURE

57 JUN 8 1976

A P P E A R A N C E S

For the Plaintiff

RICHARD C. LEONARD
2049 Century Park East
Suite 1800
Los Angeles, California 90067

For the Defendants

MS. LYNNE K. ZUSMAN
Department of Justice Building
Room 3535
10th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

62-16929-
ENCLOSURE

1 SAN DIEGO, CALIFORNIA, MONDAY, APRIL 12, 1976, 10:30 A.M.

2 --oOo--

3 THE COURT: Item No. 76-0089 Civil, Exner versus The
4 Federal Bureau of Investigation. Would you again state your
5 name for the record, please?

6 MRS. ZUSMAN: My name is Mrs. Zusman, Z-u-s-m-a-n, for
7 the Department of Justice.

8 THE COURT: All right; you may proceed.

9 MRS. ZUSMAN: This is my first appearance in this case,
10 your Honor. It was previously being handled by Mr. Neece, who
11 is the Chief of the Civil Division here in the San Diego
12 United States Attorneys' Office. My understanding of the
13 purpose of today's hearing is that a response is expected
14 from the Government in regard to plaintiff's proposed order,
15 which in essence is a Vaughn v. Rosen type order.

16 Secondly, we would like to make an affirmative
17 motion ourselves to stay judicial proceedings pending the
18 completion of Agency's review, which is provided for in the
19 Freedom of Information Statute in Section (a)(6)(c).

20 First of all, in regard to Vaughn v. Rosen,
21 proposed order of the plaintiff, I would like to make just a
22 very short argument, which is that in our reading of the
23 decisions in Vaughn v. Rosen -- and also in the case of Exon
24 Corporation v. Federal Trade Commission, which is a more
25 recent case interpreting the Vaughn v. Rosen decision -- in

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ENCLOSURE

1 both of those cases it is very clear that what the Court was
2 concerned with was trying to assist the judge in evaluating
3 whether the Agency had made a correct determination under the
4 statute to withhold documents. In other words, the Agency had
5 made a decision as to which documents, as responsive to the
6 requestors, were to be disclosed and which were to be withheld
7 because of the voluminous amount of documents in the Vaughn v.
8 Rosen case.

9 The judge was of the opinion that some kind of,
10 inventory and indexing was necessary in order for the Court to
11 evaluate whether the Agency determination had been correct in
12 the first place.

13 THE COURT: Well, of course, in this case we have had
14 no indication whatever from the Government as to the extent of
15 what they may have or anything on which we can operate, so
16 we're working in the dark. The Government won't tell us any-
17 thing, and so we have got to make an order to start the ball
18 rolling.

19 MRS. ZUSMAN: I'm sorry that the Court's understanding
20 of the facts in this situation is that the Government is
21 keeping plaintiff in the dark, and I think perhaps this would
22 be a good place for me to explain what the facts in this
23 situation are.

24 First of all --

25 THE COURT: Are you going to talk about the facts in

1 this situation or the matters that are contained in the
2 various Affidavits that you have filed as to the problems of
3 producing documents --

4 MRS. ZUSMAN: Well, it would be both because the facts
5 in the Exner request situation are in fact, as I understand
6 it, part of the facts in this situation. We feel the facts
7 which are the exceptional circumstances for the defendant
8 Agency are also part of the facts in this situation.

9 Mrs. Exner's request was received by the Federal
10 Bureau of Investigation on December 30, 1975. At that time,
11 the FBI was in receipt of something like 5,900 Freedom of
12 Information Act and Privacy Act requests, which were ahead of
13 hers. Let me say that the Bureau's manner of handling these
14 requests -- and in fact, the manner of handling by all the
15 agencies of the Federal Government, which receive these
16 requests -- that the Statute requires that there be no prefer-
17 ential treatment given to requesters; that there were changes
18 in the Act because previously under the old Administrative
19 Procedure Act, it was required that a requester had to have
20 some kind of special interest or concern. That kind of
21 provision was quite explicitly deleted in 1966 when the
22 Freedom of Information Act was passed, and the language in the
23 Statute is quite clear that any member of the public is able
24 to file for the information that it wants.

25 There have been a line of decisions, including

1 EPA v. Mink in 410 U.S. and in LRB v. Sears in Vol. 421 of
2 U.S. Reporter. In addition, in 448 F 2nd, Soucie v. David,
3 which is also a leading Freedom of Information Act case -- in
4 the two previous citations -- obviously, they are Supreme
5 Court decisions -- the Court has taken a very clear stand that
6 under this statute there is no such thing as a preferred
7 party. There is no such thing as a special standing. Every-
8 one is the same as everyone else.

9 So, the problem for the defendant at this point is
10 that when Mrs. Exner's request was received, unfortunately,
11 there were several thousand requests ahead of hers. What
12 the FBI does, is it treats requests as of the date of receipt.
13 In other words, they do not assign a number to a request as
14 it comes in. They go by the date that that request was
15 received. They are now receiving probably 50 of these requests
16 every day.

17 To return to the situation as it was for the FBI
18 at the time Mrs. Exner's request was received, there were
19 something like 5,900 requests ahead of hers. Her letter was
20 received on December 30. On January the 11th, I believe, she
21 wrote a second letter -- that is, her attorney, Mr. Monaghan,
22 did -- informing the Bureau that since there had been no
23 response, the plaintiff was treating this as she was entitled
24 to under the statute as a denial of her request, and therefore,
25 she was entitled to proceed with an administrative appeal,

1 which -- because the FBI is a component of the Department of
2 Justice -- is an appeal on a denial -- or was interpreted as
3 a denial under the Act.

4 It goes to the Department of Justice's Freedom of
5 Information Appeals Unit, which is an office under the Deputy
6 Attorney General and which has the responsibility for review-
7 ing in an appellate administrative capacity every Freedom of
8 Information denial made by a subagency of the Department of
9 Justice.

10 I would like to refer the Court quite respectfully
11 to the letter of the Deputy Attorney General, Harold Tyler,
12 which was sent on March 15 of this year to both Houses of
13 Congress, which is a letter of transmittal, which is the first
14 of the annual reports required under the statute of the
15 Department of Justice operations of the Freedom of Informa-
16 tion Act to Congress. In this letter, Judge Tyler has
17 summarized the overwhelming problems that certain parts of
18 the Department of Justice -- and especially the FBI -- has
19 had in trying as hard as it can diligently to conform with
20 the Act, but unfortunately, the volume of requests received
21 was nowhere like what Congress had in mind.

22 As a matter of fact, a look at the legislative
23 history -- and I'll be more than happy to send copies to your
24 clerk if that would be helpful -- a look at the legislative
25 history, when the 1974 amendment was being discussed, makes it

1 very clear that members of both Houses of Congress were under
2 the impression that they were merely revising already existing
3 information procedures and that they were not creating any new
4 administrative functions. Therefore, they did not appropriate
5 any additional money. The kind of costs they foresaw in the
6 discussion was something like \$50,000 in additional costs for
7 the Government the first year and \$100,000 in additional costs
8 for the next five years.

9 I would like at this point to bring to your
10 attention that the FBI in the current fiscal year, 1976, has
11 spent close to \$2,675,000. In the next fiscal year it is
12 anticipated there will be not only the same cost, \$2,675,000,
13 in responding to Freedom of Information Act requests, but an
14 additional large sum of money to respond to the Privacy Act
15 requests, which is anticipated will also start coming in.

16 The Agency, as soon as it started feeling this
17 volume -- in our office in 1973, there were eight people at
18 the Bureau who were working on Freedom of Information Act
19 requests. They were receiving roughly one request per day.
20 At the present time we are receiving something like 50 requests
21 per day. They have increased gradually over the last year to
22 191 people, who are working full time just on handling these
23 Freedom of Information Act requests, so I think that in terms
24 of trying to evaluate what the facts of the situation are, I
25 would have to emphasize for the Court that we do appreciate

1 Mrs. Exner's problem. We do appreciate the fact that under
2 the statute she is entitled to have a certain number of days
3 to file her appeal, and if that is not responded to, then, of
4 course, under the Act they can file this lawsuit, which in
5 fact she has done.

6 However, unfortunately, there are many, many, many,
7 many, many thousands of requesters who are in this same
8 situation as Mrs. Exner. Since her request was received on
9 December 30, the FBI has received over 3,594 additional
10 requests. At the time it received her request, it had over
11 5,900 requests pending, of which it was actively trying to
12 process 991.

13 Now, I noticed here in the courtroom here this
14 morning a situation that you deal with which strikes me as
15 being somewhat analogous to what the Agency is trying to do.
16 When you went over your civil case calendar, you tried to find
17 out which of the matters could be disposed of rather quickly,
18 I gather, and which of the matters on the calendar might
19 require a longer period of time, and then you proceeded through
20 your faster matters first and left the lengthier hearings for
21 later in the morning. This is the problem that is facing the
22 FBI now, and in fact, I have been told that if there is any
23 kind of preferential treatment, it is given to the individual
24 requester like Mrs. Exner, who is asking just for the infor-
25 mation about her as opposed to requests which deal with very

1 large amounts of historical documents like the Rosenberg case
2 and its files in order not to impede the flow of the thousands
3 of small requests that are coming in.

4 The Bureau tries to utilize its personnel so that
5 these individual requests can be taken in turn and yet, at the
6 same time, not be crowded up by the larger requests they
7 therefore have. They handle their requests in teams of what
8 are called analysts, who are then supervised by law-trained
9 special agents of the Bureau. They have, in addition to a
10 large number of these ten-people teams, two or three who are
11 called special project teams, which are used to address the
12 large voluminous type of requests that they do get.

13 Now, returning to Mrs. Exner's case, on January the
14 11th, she was, as I said -- she filed her second letter with
15 the Department, which was a letter to Director Kelley
16 informing him that she was going to appeal as she was entitled
17 to do at that time. On January the 15th of this year, she
18 received a letter from Director Kelley which apologized for
19 the situation, which explained the tremendous backlog, which
20 gave the facts as to how many requests were ahead of hers,
21 which explained in very, very brief format that the Bureau was
22 delayed because of its having to respond by court order to
23 several large historical type requests; i.e., the Miracle case
24 which is the Rosenberg files and the Weinstein case, which
25 involved the Rosenberg files and his files, also. That

1 occurred on January 15.

2 I believe at some time after that, Mr. Monaghan was
3 in telephone conversation with Quinlan Shea, who is the Chief
4 of this F.O.I. Appeals Unit in the Justice Department, and at
5 that time Mr. Monaghan represented to Mr. Shea that there were
6 some urgent reasons why Mrs. Exner's request should be given
7 priority treatment, to which Mr. Shea responded that a written
8 letter to that effect would have to be sent to his office. In
9 the letter which Mr. Monaghan sent, he gave two reasons for
10 giving Mrs. Exner priority treatment.

11 The first reason was that there had been threats
12 made on her life and that plaintiff felt that only when she
13 received the information that was in the FBI files about
14 herself could she feel safe. I'm not sure what the connection
15 there was, but secondly, that she felt that the information in
16 the Bureau's files would have great historical significance,
17 and for that reason, she should be given special treatment.

18 Mr. Shea responded by letter to Mr. Monaghan that
19 he was referring to Mr. Monaghan's letter to Deputy Attorney
20 General Tyler for his consideration and his determination and
21 that Mr. Shea did not himself, as Chief of the Unit, feel that
22 these circumstances were of sufficient urgency to give the
23 preferential treatment which the plaintiff was seeking.

24 Subsequently, a letter was sent by the Deputy
25 Attorney General Tyler -- I believe -- let me check. I know

1 she received another letter, and I'm just not sure whether it
2 came from Mr. Tyler or --

3 MR. LEONARD: From Shea?

4 MRS. ZUSMAN: No, I just mentioned the one from Mr.
5 Shea. I am talking about the letter -- she received another
6 letter, I believe, after that. Let's see. Shea's letter was
7 February the 5th. Yes, the next one was the February 19
8 letter from Director Kelley, which stated, to assure fair and
9 impartial treatment of all requests made under the Freedom of
10 Information and Privacy Acts, the FBI handled such requests in
11 chronological order based on date received. The statutes in
12 question do not permit one individual's request for his or
13 her file to be given priority over another's. Indeed,
14 equitable treatment of all requesters is the very basis for
15 not attempting to establish such priorities, but instead, of
16 handling each in chronological order.

17 Now, I can understand that from the plaintiff's
18 point of view, there has been a feeling, as I gather from
19 your remark and from the remarks of private counsel who I
20 spoke with before the hearing, that plaintiff has been kept
21 in the dark. I would like to say that it is my understanding
22 that as much information could be given her as was available
23 based on the fact that because her request was not taken out
24 of turn, no search has been made yet as to the number of
25 documents responsive to her request because the Department of

1 Justice feels very strongly as a matter of principle that if
2 we were to find the circumstances which Mrs. Exner has put
3 forward, entitling her to special consideration, then my
4 goodness gracious, we have thousands of other requesters who
5 also have very special reasons for having their requests taken
6 out of turn.

7 So, to be very truthful, and with all the facts
8 before you right now, I cannot say whether there are 50 pages
9 of documents responsive to Mrs. Exner's request or whether
10 there are 2,000 pages of documents responsive to Mrs. Exner's
11 request, and I'm sorry that the correspondence between the
12 Department of Justice and the FBI and the plaintiff has not
13 given Mrs. Exner any additional information. This is the very
14 best that we could do.

15 I would like to say this, that my defendant, the
16 Federal Bureau of Investigation, is not unaware of the
17 problems. It is not unaware of the fact that it's very
18 difficult for the requesters to understand why they have to
19 endure these long, long waits, and it's just a very unfortunate
20 situation.

21 THE COURT: Have you ever heard of the Speedy Trial Act?

22 MRS. ZUSMAN: Yes, I have.

23 THE COURT: All right.

24 MRS. ZUSMAN: I think, though, that the answer to the
25 situation here is in the Freedom of Information Act, and I

1 would address your Honor's attention to Subsection (a) (6) (C),
2 in which Congress has provided that when there are exceptional
3 circumstances and where the Agency has demonstrated that it is
4 responding to plaintiff's request with due diligence, that the
5 Court is empowered to retain jurisdiction and to issue a stay
6 of proceedings until there has been a determination at the
7 administrative agency level.

8 I would like to point out that because the Act is
9 very complicated, because there have been changes made in it
10 by the recent amendments, that addressing oneself to a parti-
11 cular request can be a very involved and very complicated job.
12 Under the principle of execution of administrative remedy,
13 which has been wrongly established in the court, and has been
14 upheld in several Freedom of Information Act cases, which I
15 have cited in my brief, including Jaffess v. Secretary of HEW,
16 Tuchinsky v. Selective Service, the Center for National Policy
17 Review and so forth, that Freedom of Information Act is a
18 special problem, but it doesn't mean that established principles
19 have to fall by the wayside.

20 As a matter of fact, in Deputy Attorney General
21 Tyler's letter to Congress, he points out that one of the
22 reasons that the Department is so slow in responding to these
23 requests is that a very careful review is made at the
24 Appellate administrative level. He states -- and this is
25 stated in his Affidavit -- that in over 50 percent of the

1 denials, the Appellate Administrative Unit has either issued
2 a reversal or a substantial modification of the original
3 Agency decision; and I think this is clearly a situation where
4 the expertise of the Agency and judicial economy does require
5 that the Agency be permitted to complete its review.

6 On behalf of my client, I would like to say that
7 the Bureau would be more than happy to keep both the Court and
8 the plaintiff informed at regular intervals. However, of the
9 progress that is being made, they anticipate that they will
10 reach Mrs. Exner's request in approximately four months. That
11 is a rough estimate based on their previous processing exper-
12 ience. It is very likely that that might be accelerated,
13 depending on how small or large the requests are that are
14 handled before hers.

15 On the other hand, if we are hit by another court
16 order by a judge sitting in another part of the country, and
17 we have to drop everything, then it might be a considerably
18 longer length of time. That, in effect, is, I suppose, a
19 floodgate situation which is facing the Agency now and the
20 Department; that there have been just a very few decisions so
21 far which have asked for accelerated processing. Those have
22 had disastrous effects -- which are outlined in the Affidavit,
23 and I wouldn't go into them here -- in terms of reallocating
24 personnel resources.

25 Because of the fact that there are so many requesters

1 who are having to wait in line, all of whom theoretically
2 could be filed in lawsuits, that eventually we would have a
3 situation -- if the Judge gave plaintiff relief in this
4 particular situation -- we would have a circumstance where
5 there would be courts all over the country and where the only
6 processing that would be going on would be going on under
7 court order, and I appeal to the Court quite fervently that
8 although this is a very bad situation -- and I hope that
9 Congress -- I am sure that they are already considering what
10 can be done to ameliorate it -- that the answer is not for the
11 Court to become involved at this point. Thank you.

12 THE COURT: Mr. Leonard?

13 MR. LEONARD: Your Honor, there is a Yiddish term which
14 I have heard before, and I am not sure of the spelling --
15 chutzpah, and there is no translation in the English language
16 that I know of. The only example I can think of is the child
17 who killed his parents and comes before the court and pleads
18 for mercy because he is an orphan.

19 I think what the Government is doing today is an
20 example of that. Mrs. Zusman did not have the benefit of
21 being here for the March 15 hearing. I hoped to have a
22 transcript for the Court of that hearing today; I have not
23 gotten it from the reporter yet.

24 What the Government has done -- even though this
25 Court issued an order on March 15 stating that the defendant

1 was supposed to go through its records, answer the complaint,
2 and submit an inventory to us by April 12 -- it has done
3 nothing; it hasn't looked for the record and hasn't done any-
4 thing with the record.

5 It comes before you now, and the Government says we
6 are very busy; we have all these things pending, and we just
7 haven't had a chance to get to it. Other judges have made
8 orders asking us to look for records, and that has been keeping
9 us busy. We followed their orders; we haven't followed your
10 Honor's Order; we just ignored it, and we come in on the last
11 day -- on April 12 -- and we ask for an order to give us four
12 more months in time.

13 Although Mrs. Exner has claimed physical danger, we
14 don't believe it; we don't think there is anything to that, and
15 even though the Court thought there might be something to that,
16 in our own wisdom and as judge and jury, we, the Government,
17 have ignored her request, have ignored her plea of physical
18 danger. We are not going to expedite; we are going to do it
19 in line with everything else.

20 However, we have a statute that says you don't have
21 a right to deem the request denied, which the Government did at
22 the first level, the appellate level, and that is, to file a
23 lawsuit.

24 Mrs. Exner is not like everyone else who has filed
25 a previous request to see their FBI file. Mr. Shea, in his
letter to Mr. Monaghan on February 5, admitted that many of

1 his requests are frivolous. If someone needs their record,
2 they have a way to proceed; they can proceed by filing an
3 action in an appropriate District Court. Mrs. Exner has done
4 that. The Government ignores that; we don't care if she's
5 filed an action or not, if there's an order from the Court or
6 not. We are just going to keep her in line with everyone else.

7 This matter has been argued on March 15. We
8 pointed out the rights for expedition; the Court agreed with
9 us. We submitted an order that followed the Court's ruling,
10 citing Vaughn v. Rosen, and the procedures intimated there,
11 and the Government comes back today and says we have done
12 nothing; we have not searched for one record. This is even
13 more blatant because the FBI turned these records over, we
14 believe, to a Senate Committee. We don't know what those
15 records look like, but there is certainly substantial evidence
16 to that effect.

17 This file has already been located, we believe.
18 It's been processed; it's been turned over. All the Govern-
19 ment has to do is to look at it; they haven't taken the steps
20 to do that yet. They spend more time and money sending Mrs.
21 Zusman out here with no knowledge of what went on March 15
22 than it would have taken either time wise or expense wise
23 to go through that file and comply with the Court's Order.

24 I am just amazed that the Government can stand
25 before this Court, knowing that it's willfully disobeyed this

1 Court Order, and ask for four more months time and state that
2 there is no reason to expedite. I think this matter has been
3 argued. It has been decided; there is no reason for delay
4 now. I think the Court should sign the Order we have submitted,
5 which I think does accurately reflect the Court's Order of
6 March 15, and this Court should proceed in that regard.

7 MRS. ZUSMAN: May I have a rebuttal?

8 THE COURT: If you can make it brief; you said ten
9 minutes before.

10 MR. LEONARD: I have one brief report. The Government
11 played a little game with us at the last hearing. They didn't
12 answer the Freedom of Information Act in 30 days. The Privacy
13 Act requires 60 days, and they took the 60-day period of time.
14 I would like to point out to the Court that the Government's
15 response does not comply with the Freedom of Information Act,
16 and there is no similar section in the Privacy Act. Moreover,
17 under the Freedom of Information Act section, which is 5 U.S.C.
18 552 (a)(6)(C), it provides that a stay can be issued by the
19 Court if the Government complies with two requirements. One
20 is that they can show exceptional circumstances exist, and two
21 is that -- and I quote -- ". . . the agency is exercising due
22 diligence in responding to the request, . . ."

23 Number one, the Government has not shown exceptional
24 circumstances. The only showing by the Government today is
25 the same showing that they make on every single Freedom of

1 Information Act or Privacy Act request -- they are bogged down.
2 I am sorry they are bogged down. This is an exceptional case.
3 They have showed no circumstances as to why they can't
4 respond.

5 Number two, they show no due diligence in responding
6 to the request. They have admitted they haven't done that.
7 They haven't attempted to respond to the request. They
8 haven't started searching; they haven't started inventorying;
9 they haven't started anything. They have not complied with
10 the section under the Freedom of Information Act. There is
11 no similar section in the Privacy Act. They have no right to
12 this relief. Thank you.

13 THE COURT: All right.

14 MRS. ZUSMAN: There are two points I make inquiry to as
15 to the previous hearing. It was my understanding that there
16 has been no substantiation of the plaintiff's claim that her
17 life has been threatened, so at this point in time I would
18 like to say that that basis for her request for preferential
19 treatment as far as we are concerned remains somewhat up in
20 the air.

21 Secondly, I have a question about the counsel's
22 terminology that the Government has willfully disobeyed the
23 Court's Order. Now, perhaps the Court can correct me on this;
24 I have had several conversations with Mr. Neece.

25 THE COURT: Where is Mr. Neece? Why isn't he here today?

1 MRS. ZUSMAN: I believe he has another matter, your
2 Honor, also, but it was my understanding that the Order of
3 the Court had not been filed yet. I have asked for a copy of
4 it, and I had understood that what had happened was that your
5 Honor had made an order at the previous hearing but then, due
6 to whatever circumstances happened afterward, a decision was
7 made that the Government would be allowed to oppose the order
8 at this hearing, and that is why I'm here. I was not under
9 the impression that we were in disobedience of an order that
10 had been entered.

11 THE COURT: All right. Let me ask you this: Where are
12 you from?

13 MRS. ZUSMAN: I am a member of the California Bar. I
14 came from Washington, D.C.

15 THE COURT: You are working in Washington for the
16 Department of Justice?

17 MRS. ZUSMAN: Yes.

18 THE COURT: When did you come out to San Diego?

19 MRS. ZUSMAN: Yesterday.

20 THE COURT: So, you used yesterday in transportation.
21 When are you going back?

22 MRS. ZUSMAN: This afternoon.

23 THE COURT: I see. So, that is two days you've used on
24 this matter. Well, let me say this. I think it was very
25 clear, of course, that you were not here at the time of the

1 prior hearing. The Court did, I think, make it quite clear
2 that this was to be complied with by April the 12th. An Order
3 was presented by Mr. Leonard, which I actually signed, and
4 then I think thereafter, the Government decided that it had
5 some quarrel with the terms of the Order; so I held it for
6 awhile. It had actually been signed, but not filed. But the
7 Order was made at the hearing on March 15 as to what the
8 Government was to do. Apparently, the Government has done
9 nothing..

10 Now what the Government has done today is that they
11 have filed about 50 pages of materials, affidavits and so on,
12 which I assume has taken a great deal of time for somebody to
13 prepare. You have spent or will have spent two days on this
14 matter in transportation in appearing here. I have an idea
15 that you spent some time preparing for this hearing and pre-
16 paring these papers, and yet, the Government has done nothing
17 to comply with the Court's Order.

18 I just find it rather incredible to hear that the
19 Government hasn't even looked at the file and doesn't even
20 know whether it's a small file, a big file, or what's in it
21 when obviously, the FBI provided the file to the Senate
22 Committee, which has had the file, and Mrs. Exner filed her
23 request over three months ago.

24 Here the Government is back again saying well,
25 we'll get around to it; we'll get around to it. I don't think

1 this is proper treatment on the part of the Government. I
2 realize you do have problems, and that the volume of these
3 requests is greater than had been perhaps anticipated. The
4 courts have problems, too.

5 I mentioned the Speedy Trial Act earlier by which
6 Congress has imposed on the courts the duty of processing
7 criminal cases expeditiously, and Congress doesn't care how we
8 do it. They just say do it, and we are doing it; and I think
9 it's up to the Government to process these requests with some
10 reasonable expedition.

11 I think that when we have a hearing in a court, and
12 the Court makes an order -- then we get a new team in here --
13 a new lawyer appears; Mr. Neece isn't even here -- I just find
14 it very difficult to accept the Government's position, and I
15 think that the Government is not dealing either expeditiously
16 or fairly in this situation. And so I will --

17 MRS. ZUSMAN: Your Honor --

18 THE COURT: I will grant the Government a further stay
19 because apparently you are in a situation where you don't have
20 the file in your hand. I'll grant an additional 15 days for
21 the Government to comply with the Court's Order. My clerk has
22 just handed me a note saying that the Order was filed on
23 Friday. That's probably true, but it was made substantially
24 in detail on March 15, and Mr. Neece was aware of it, and I'm
25 sure that he informed the Government.

1 MRS. ZUSMAN: Well, he has -- I tried to explain -- he
2 led me to believe -- and I am sure that this is his under-
3 standing. I do not think that I am misstating what his
4 understanding was, which was that the purpose of this hearing
5 would be in order to allow further argument on this opposition
6 to the proposed order. Thank you very much, your Honor.

7 THE COURT: If the Government had used part of the
8 effort -- just a small part of the effort -- in time that has
9 been required for you to come out here, for you to prepare
10 these papers -- and it is a rather thick bunch of papers that
11 have been prepared -- to take a look at the file and to try
12 to do what the Court requested, this thing could already have
13 been taken care of.

14 Now, I think it is rather obvious to me that the
15 FBI just doesn't want to give this file out, and I don't think
16 that they're being forthright in coming in and saying, well,
17 we don't have enough money to process this; we don't have
18 enough personnel to process it; we just haven't gotten around
19 to it. I just don't think that that is a reasonable response
20 to the Court's Order back on March 15.

21 MRS. ZUSMAN: I don't want to offend the Court in any
22 way. I would like to say this: it's my privilege to work
23 for the Justice Department in Washington. It's my privilege
24 to work with individuals who work for the Federal Government
25 across the border.

at the Bureau.

1 THE COURT: Are you telling me that nobody has looked at
2 this file in connection with any of these proceedings?

3 MRS. ZUSMAN: That is what I was told.

4 THE COURT: Who told you that?

5 MRS. ZUSMAN: I asked directly the individual attorney,
6 who is the FBI person at the FBI assigned to this case.

7 THE COURT: What is his name?

8 MRS. ZUSMAN: Mr. Maschella.

9 THE COURT: And no one in the FBI ever looked at this
10 file in the Justice Division?

11 MRS. ZUSMAN: The Federal Bureau of Investigation, as
12 you know, is a separate subagency. When I asked if they had
13 any idea what the ~~scoop~~ ^{scoop} was in response to this request, I
14 was told that as a matter of principle, the file has not been
15 looked at. Now, obviously, you have your own idea of what
16 the situation is, and I'm very sorry that this is what you
17 have concluded. Thank you.

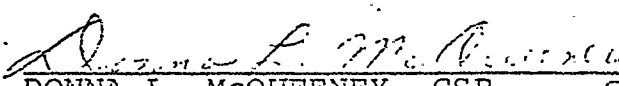
18 --ooo--
19
20
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22
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25

C E R T I F I C A T E

I, DONNA L. McQUEENEY, CSR, hereby certify that I am a duly appointed, qualified and acting Official Court Reporter for the United States District Court, Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings heard before the Hon. Edward J. Schwartz, on the date herein mentioned, in the case of Judith Katherine Exner v. Federal Bureau of Investigation, No. 76-0089 S, consisting of 23 pages.

DATED: This 23rd day of April, 1976.


DONNA L. McQUEENEY, CSR
Official Court Reporter

ROUTING AND TRANSMISSIONAL SLIP

ACTION

1 TO (Name, office symbol or location)

INITIALS

CIRCULATE

DATE

COORDINATION

b6

b7c

2

INITIALS

FILE

DATE

INFORMATION

3

INITIALS

NOTE AND RETURN

DATE

PER CON -
VERSATION

4

INITIALS

SEE ME

DATE

SIGNATURE

REMARKS

Do NOT use this form as a RECORD of approvals, concurrences, disapprovals, clearances, and similar actions

FROM (Name, office symbol or location)

DATE

PHONE

Lynne K. Gusman, Attorney
Information & Privacy Section

5/26

4096

OPTIONAL FORM 41

AUGUST 1967

GSA FPMR (41CFR) 100-11.206

16-10-81594-1

552-103

GPO

5041-101

FBI

9

May 13, 1976

175-12-2633

Telephone:
(802) 739-3425

Mr. Emil E. Valff, Jr.
Clerk, United States Court of Appeals
for the Ninth Circuit
P. O. Box 347
San Francisco, California 94101

Attention: Mr. Bruce Cutler

Re: Judith Katherine Turner v. Federal
Bureau of Investigation, et al.
(CA. No. 76-1903)

Dear Mr. Valff:

Please find enclosed four copies of page five (5)
of the "Government Appellants' Response to Appellee's
Motion to Dismiss the Bill".

We regret that these pages were omitted in the
reprinting process. We were unaware of the omission
until it was brought to our attention by appellee's
counsel on this date.

I regret any inconvenience this may have caused
the Court.

Yours very truly,

ELIZABETH M. BOWLES
Attorney, Appellants' Section
Civil Division

Enclosures (4)

cc: Richard C. Leonard, Esquire
2015 Conventary Park East
Suite 1400
San Diego, California 92107

62-116707-

NOT RECORDED

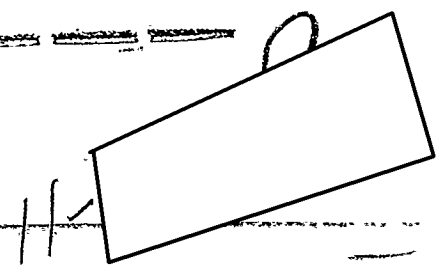
14 JUN 11 1976

b6
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1-3446

56 JUN 16 1976

F352



FBI Headquarters to a Freedom of Information Section devoted solely to processing FOIPA requests, including 23 law-trained agents; that the FBI had received 13,875 FOIPA requests in 1975; and that all requests were being processed in chronological order with the exception of several cases in which courts had ordered expedited processing of requests (Hanigan Affidavit, paras. 10,11).^{5/} He estimated that processing of Mrs. Exner's request would begin in approximately four months (Affidavit, para. 15).

Quinlan Shea, Chief of the Freedom of Information and Privacy Unit, Office of the Deputy Attorney General, testified by affidavit that his Unit, which is devoted almost exclusively to the handling of administrative appeals, has eleven full-time attorneys assigned to the job. The Unit received over one thousand appeals in 1975, as compared to one hundred appeals received by the Department of Justice in 1974. Mrs. Exner's request has been assigned the number

^{5/} Agent Hanigan stated that the court-expedited cases required a substantial re-allocation of personnel from the processing of other requests. For example, the Rosenberg case (Meeropol v. Levi, D. D.C. Civil Action No. 75-1121) absorbed about one half of the FOIPA Unit's personnel during the several months when the trial papers were processed pursuant to court-imposed deadlines. The Alger Hiss case (Weinstein v. Levi, D. D.C. Civil Action No. 2278-72) similarly required a disproportionate allocation of personnel to a single case. The same is true of a voluminous case presently being processed under orders of a district court in Wisconsin (Fellner v. U. S. Department of Justice, W.D. Wisc. Civil Action No. 75-C-430)) (Affidavit, para 12).

FEDERAL GOVERNMENT

FILED
ENTERED
LODGED
RECEIVED
AUG 12 1977
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff

Civil Action Number
76-89-SA

v.

FEDERAL BUREAU OF INVESTIGATION, et al.

Defendants

AFFIDAVIT

I, Marvin Lewis, being duly sworn, depose and
say as follows:

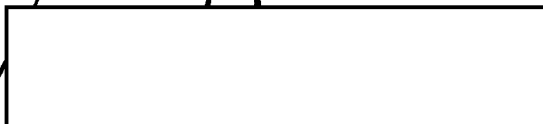
(1) I am a Special Agent of the Federal Bureau
of Investigation (FBI), assigned in a supervisory capacity
to the Freedom of Information - Privacy Acts (FOIPA) Branch
of the FBI, Washington, D. C.

(2) Pursuant to the Court's Order of August 1,
1977, I have prepared documents responsive to plaintiff's
FOIPA request for the Court's in camera inspection. These

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1 have been previously described in Exhibit A to Second Affidavit
2 of Michael L. Hanigan, dated June 9, 1976 (hereinafter
3 Second Hanigan Affidavit).

4 (3) As explained in the Second Hanigan Affidavit,
5 documents containing information identifiable with the plaintiff
6 were scattered through volumes of materials concerning the
7 investigation of others. The full document in which plaintiff's
8 name appears is being submitted. The in camera documents have
9 been assembled on "file backs" and in the order described in
10 the Second Hanigan Affidavit. An index sheet has been attached
11 to each package, and each package is lettered sequentially.
12 This sheet also sets forth the page number in the Exhibit to the
13 Second Hanigan Affidavit where the document has been previously
14 described and the pages in the document which are pertinent
15 to plaintiff's request.

16 (4) Plaintiff's counsel has been advised that
17 additional administrative material previously withheld would now
18 be released pursuant to a change in Department of Justice policy
19 regarding instances in which the exemption allowed by Title 5,
20 United States Code, Section 552 (b) (2) is asserted. Routing
21 blocks and routing stamps have been released pursuant to this
22 change. File numbers previously withheld only for convenience
23 of processing have also been released. Exemption (b) (2), in
24 conjunction with (b) (7) (D), will continue to be asserted to
25 withhold informant symbol numbers. These numbers represent the
26 internal FBI practice utilized to protect the identity of

27 / / / /

28 / / / /

1 sources from unauthorized disclosure. They play an integral
2 part in affording maximum security to FBI informants. Release
3 would cause a breakdown in the security system and could assist
4 in the actual identity of the sources.

5 (5) A close review of all documents in preparation
6 for this in camera review has revealed several instances where
7 plaintiff's name appears on a page of a document which was
8 heretofore not considered for release. This oversight was due,
9 in most instances, to the fact that the initial processing of
10 these documents had overlooked an index at the very end of
11 several FBI reports and had instead relied only on the table of
12 contents at the beginning of these reports as the guide in
13 locating the specific pages within the document which contained
14 information pertaining to the plaintiff. These additional
15 references to the plaintiff have now been processed pursuant to
16 the Freedom of Information Act (FOIA). Several additional
17 "administrative" or "cover pages" and synopses of FBI reports
18 which contain a reference to or mention of the plaintiff's name,
19 have also been processed for release. In one instance, a docu-
20 ment was withheld which contained substantially the same
21 information as another which was released in part. The former
22 has now been released to plaintiff consistent with the release
23 of the latter.

24 (6) The aforementioned changes and corrections set
25 forth in paragraphs four and five, supra., are included in
26 the documents available to the Court for in camera inspection
27 and have been transmitted to the plaintiff on August 10, 1977.

3 28 (A copy of this letter is attached hereto and made a part

1 hereof as Exhibit A.)

2 (7) Those portions of the documents for which no
3 exemption is claimed have been marked through with a yellow
4 highlighter. This is the material which has now been released
5 pursuant to plaintiff's FOIPA request, administrative appeal and
6 the current in camera review. Exemptions allowed by the FOIA
7 have been noted in the margin. The notation "OSR," indicates
8 that the paragraph is "outside the scope" of plaintiff's
9 request and appears only on those pages listed on the index
10 sheet.

11
12
13
14 Marvin Lewis
15 MARVIN LEWIS
16 Special Agent
17 Federal Bureau of Investigation
18 Washington, D. C.

19 Subscribed and Sworn to before me this 10th day of
20 August, 1977.

21 Sharon Fulton
22 Notary Public

23 My commission expires October 31, 1980
24
25
26
27
28

August 10, 1977

Richard C. Leonard, Esq.
Suite 1200
433 North Camden Drive
Beverly Hills, California 90210

Dear Mr. Leonard:

Reference is made to the Freedom of Information-Privacy Acts request of your client, Judith Campbell Exner, and subsequent litigation.

Please be advised that an examination of the documents within our central records in preparation for the court ordered in camera review has revealed several instances where your client's name appears on a page of a document which was heretofore not considered for release. This oversight was due, in most instances, to the fact that the initial processing of these documents had overlooked an index at the very end of several FBI reports and had instead relied only on the table of contents at the beginning of these reports as the guide in locating the specific pages within the document which contained information pertaining to your client. These additional references to her name have now been processed pursuant to the Freedom of Information Act (FOIA). Several additional "administrative" or "cover pages" and synopses of FBI reports which contain a reference to or mention of her name, have also been processed for release. In one instance, a document was withheld which contained substantially the same information as another document previously released. The former is now being released consistent with the release of the latter.

In conversation with Ms. Lynne K. Zusman of the Department of Justice, you expressed the desire of your client to have FBI records relative to Ms. Exner reprocessed for the release of any administrative material no longer exempt under Title 5, United States Code, Section 552 (b) (2). Those records consisting of 29 pages containing excisions wherein exemption (b) (2) was cited have now been reprocessed and are enclosed.

Exhibit A

ENCLOSURE

62-116727-

Richard C. Leonard, Esq.

An additional 73 pages of new material from our records are also enclosed. Please note that the majority of these pages are from the Table of Contents or Index as mentioned above and contain no substantive information concerning your client.

Sincerely yours,


Clarence M. Kelley
Director

Enclosures (61)

E. E. Cayne, Carded
62-116929-

FEDERAL GOVERNMENT

TERRY J. KNOEPP
United States Attorney

CHARLES H. DICK, JR.
Assistant United States Attorney

United States Courthouse
940 Front Street, Room 5-N-19
San Diego, California 92189
Telephone: 895-5610

Attorneys for Defendants.

FILED
ENTERED
LODGED
RECEIVED
JUL 29 1977
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,
Plaintiff,

v.

CIVIL ACTION NO. 76-89-SA

FEDERAL BUREAU OF
INVESTIGATION, et al.

DEFENDANTS' REPLY BRIEF

Defendants.

Plaintiff filed this suit under the Freedom of Information Act (FOIA), 5 U.S.C. 552 and the Privacy Act, 5 U.S.C. 552a, seeking access to records maintained by the Federal Bureau of Investigation. After defendants' motions to stay judicial proceedings pending completion of agency review of the documents were denied, the documents were processed and released to plaintiff except for portions of documents withheld to protect the privacy of third parties and confidential information, the disclosure of which would reveal a confidential source, pursuant to 5 U.S.C. 552(b)(7)(C) and (7)(D). Defendants also withheld under 5 U.S.C. 552 (b)(7)(F) information from one document which would endanger the life or physical safety of law enforcement personnel. Material from two documents was

1 withheld as agency deliberative material protected by
2 5 U.S.C. 552(b)(5). Deletions were made on the basis of
3 5 U.S.C. 552(b)(2). Due to a recent determination by the
4 Deputy Attorney General, that this exemption should no
5 longer be invoked to withhold administrative or routine
6 markings, and other such material, the documents which
7 contain deletions made on this basis are currently being re-
8 processed to eliminate the deletions and therefore to disclose
9 additional material.

10 Defendants moved to dismiss, or in the alternative, for
11 summary judgment and respectfully referred the Court to the
12 Second Affidavit of Michael L. Hanigan and the memorandum in
13 support of the motion. Plaintiff opposed defendants' motion
14 and requested in camera inspection of FBI documents. Defendants
15 now reply to plaintiff's papers and rely on the affidavit
16 and memorandum earlier filed as well as the affidavit of
17 Gordon G. McNeill, Special Agent of the Federal Bureau of
18 Investigation, dated July 13, 1977.

19 Defendants' motion should be granted for the reasons
20 set forth in their prior memorandum since the contentions
21 set forth in plaintiff's papers do not detract from or rebut
22 the showing made by defendants that the defense motion
23 should be granted. Defendants have shown that the material
24 at issue has been properly withheld under the Freedom of
25 Information Act and the Privacy Act.

26 DISCUSSION

27 The Court is wholly justified in granting defendants'
28 motion on the basis of the record now before it. In addition
29 to the affidavits earlier filed, defendants have recently
30 filed the McNeill affidavit. Mr. McNeill, a Supervisor in
31 the Organized Crime Section of the Federal Bureau of
32 Investigation, is assigned to the unit dealing with

1 organized crime in the Western United States. McNeill
2 re-iterates Special Agent Hanigan's statement that nearly
3 all the documents containing information concerning plain-
4 tiff were obtained from an anti-racketeering investigation
5 of John Roselli. McNeill further states that other references
6 to plaintiff were located in files dealing with the broad
7 subject matter of the FBI's Criminal Intelligence Program
8 as it relates to certain FBI Field Offices in California
9 and that plaintiff's name appears in but a small portion
10 of these files. These documents are replete with infor-
11 mation pertaining to other individuals gathered by high
12 level organized crime informants. Dissimination of the
13 information received from these informants could place
14 their lives and physical well-being in jeopardy as well
15 as that of their families. (McNeill Affidavit, page 2).

16 Furthermore, disclosure of these identities could
17 severely hinder the FBI's ability to continue to receive
18 high quality information in this complex area of investiga-
19 tion. These investigations consume years of effort to
20 develop and premature disclosure of some of these sources
21 could affect investigations in progress and compromise the
22 future effectiveness of the sources in gathering quality
23 information in the Organized Crime area. (McNeill Affidavit,
24 pages 2 and 3).

25 The legislative history of the 1974 Amendments to the
26 Freedom of Information Act makes it clear that while in
27 camera inspection is an option available to the Court in
28 Freedom of Information Act cases, it should be used
29 sparingly and only because of a critical gap in the public
30 record presently before the Court.

31 Before the Court orders in camera inspection the "govern-
32 ment should be given the opportunity to establish by means of

1 testimony or detailed affidavits that the documents are clearly
2 exempt from disclosure." H.R. Rep. No. 93-1380, Conference
3 Rep. 93d Cong., 2s Sess. 9 (1974); S. Rep. No. 93-854,
4 93d Cong., 1d Sess. 15)1974). This legislative statement
5 was relied on once again in the recent decision of the
6 Court of Appeals for the District of Columbia, Weissman
7 v. CIA, No. 76-1566 (D.C. Cir., January 6, 1977; April 4,
8 1977) (slip opinion attached). In that opinion the Court
9 noted:

10 "We adopted this view in Vaughn v. Rosen,
11 which specified that where the public
12 record is sufficient to permit a legal
13 ruling, the inquiry need go no further,
14 157 U.S. App. D.C. 340, 484 F.2d 820,
15 824 (1973) . . .

16 The reluctance of Congress and the courts
17 to require in camera inspection is well
18 founded. In camera inspections are bur-
19 densome and are conducted without the
20 benefit of an adversary proceeding.
21 Vaughn, supra, at 824. A denial of con-
22 frontation creates suspicions of unfairness
23 and is inconsistent with our traditions."
24 (Weissman, supra, pp. 10-11)

25 The importance of endorsing this approach to in camera
26 review was underscored by the Court's appreciation of the
27 true intent of Congress in this regard as well as by prac-
28 tical realities. As the Court so wisely stated it:

29 "In every FOIA case, there exists the
30 possibility the Government affidavits
31 claiming exemptions will be untruthful.
32 Likewise, in every FOIA case, it is
33 possible that some bits of non-exempt
34 material may be found among exempt
35 material, even after a thorough agency
36 evaluation. . . .

37 If, as appellant argues, these possibilities
38 are enough automatically to trigger an in
39 camera investigation, one will be required
40 in every FOIA case. This is clearly not
41 what Congress intended, nor what this
42 Court has found to be necessary." (Emphasis
43 added.)
44 (Weissman, supra, p. 11.) 1/

45 1/ See Ftn. 11 of Weissman opinion attached.

1 In a recent decision involving claims by the
2 Department of HEW that inter-agency memoranda were exempted
3 documents under 5 U.S.C. §552(b)(5) the Court rejected
4 plaintiff's urging that in camera inspection was required
5 on the presumption that "Courts are to be trusted to be
6 impartial and that a third-party review by a Court is
7 more comforting than review by representatives of the
8 agency resisting disclosure." Morton-Norwich Products,
9 Inc. v. Mathews, 415 F. Supp. 78, 82 (D. D.C. 1976).
10 The Court characterized this attitude as "superficially
11 enticing if one overlooks the experience of history
12 that indicates how arbitrary judges as well as others
13 in authority become if they conduct their business in
14 secrecy." Ibid. The Court upheld the integrity of the
15 administrative process thusly:

16 "First, if the Government wished
17 wrongfully to withhold, it need not
18 have ever indicated that the documents
19 existed in the first place. Second,
20 sanctions now exist under the amended
21 act against those who improperly con-
22 ceal, 5 U.S.C. §552(a)(4)(f). The
23 FDA processes thousands of Freedom
24 of Information Act requests a year.
25 It has a specialized staff which
26 proceeds with legal advice. The U.S.
27 Attorney in contested cases reviews
28 that advice. There is nothing in
29 this case to suggest that the agency
30 has not been forthright or responsive.
31 The Freedom of Information Act must
32 proceed in an atmosphere of confidence
in government. If the agency cannot
be trusted, the Act will never work.
It is a profound mistake to transfer
administrative responsibility to judges
on the theory that persons employed
by the Executive Branch are not honest
or lack judgment. The effort to do
this through the in camera process is
misplaced." (Morton-Norwich, supra,
pp. 82-83.)

30 The necessity for the Court to give credence to the
31 representations of government agency officials is well
32


1 established. In another recent opinion, the U.S. District
2 Court for the District of Columbia refused plaintiff's plea
3 for in camera review of Federal Trade Commission internal
4 documents under 5 U.S.C. §552(b)(5). Bristol-Myers v. FTC,
5 Civil Action No. 76-1364 (D.C. December 28, 1976) (Slip
6 opinion attached). Even as to the possibility of identifying
7 non-exempt segregable material, the Court stated:

8 "In view of the evident substantial
9 and good faith compliance with the
10 requirements of the law insofar as
11 the other disputed documents are
12 concerned, the Court will take the
Commission at its word and not re-
quire in camera inspection." Ibid.
(See also Wellford v. Hardin, 330
F. Supp. 915 (D. Md. 1971).

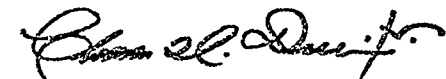
13 Because of the sensitivity of these files as part
14 of the Government's investigation of organized crime
15 activities, their protection is especially important.
16 Plaintiff's claim that defendants' withholding is unjustified
17 because segments of some of the eighty-six documents released
18 partially to the plaintiff have not been released, ignore the
19 description defendants have made of the files where plaintiff's
20 name appears. It is clear from the record that plaintiff's
21 name merely appears peripherally in files largely unrelated
22 to her, i.e., files dealing with other individuals and
23 activities in which she was not involved. Wherever her name
24 appears, the material has been processed as responsive to
25 the request for information about herself. However, where
26 the material reveals the names of other individuals, other
27 than Roselli and Sam Giancana, it has been withheld to
28 protect the third party's identity. Where the material
29 reveals a confidential source or confidential information
30 furnished only by a confidential source, or would cause
31 damage to law enforcement personnel, it has been withheld.
32 The statute amply supports the Government's withholding of


documents for these reasons. Defendants have fully established the need for confidentiality of those portions of these investigative files which have not been released.

Respectfully submitted,


BARBARA ALLEN BABCOCK
Assistant Attorney General *LJ*

TERRY J. KNOEPP
United States Attorney

By: 
CHARLES H. DICK, JR.
Assistant United States Attorney


JEFFREY AXELRAD *LJ*


LYNNE K. ZUSMAN

Attorneys, Department of Justice
Washington, D. C. 20530
Telephone: (202) 739-4544

Attorneys for Defendants.

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF CALIFORNIA

3 JUDITH KATHERINE EXNER,
4 Plaintiff,
5 v.
6 FBI, et al.,
7 Defendants.

No. 76-89-S

CERTIFICATE OF SERVICE

BY MAIL

10 STATE OF CALIFORNIA)
11) ss.
12 COUNTY OF SAN DIEGO)

12 IT IS HEREBY CERTIFIED that:

13 I, Nancy Amans, am a citizen of the United States
14 over the age of eighteen years and a resident of San Diego County,
15 California; my business address is 940 Front Street, San Diego,
16 California; I am not a party to the above-entitled action; and

17 On July 29, 1977, I deposited in the United States
18 mail at San Diego, California, in the above-entitled action, in
19 an envelope bearing the requisite postage, a copy of

20 DEFENDANTS' REPLY BRIEF

23 addressed to Richard C. Leonard, Esq. 433 North Camden Drive, Suite
24 1200, Beverly Hills, CA 90210,

25 the last known address, at which place there is delivery service
26 of mail from the United States Postal Service.

27 I declare under penalty of perjury that the foregoing is
28 true and correct.

29 Executed on this 29 day of July, 19 77.

31 Nancy R Amans
32 Nancy Amans

ENCLOSURE

62-116727-

<input checked="" type="checkbox"/>	FILED
<input type="checkbox"/>	ENTERED
<input type="checkbox"/>	LODGED
<input type="checkbox"/>	RECEIVED
JUL 19 1977	
CLERK, U.S. DISTRICT COURT	
SOUTHERN DISTRICT OF CALIFORNIA	
BY	DEPUTY

TERRY J. KNOEPP
 United States Attorney
 CHARLES H. DICK, JR.
 Assistant U.S. Attorney
 United States Courthouse
 940 Front Street, Rm. 5-N-19
 San Diego, California 92189
 Telephone: (714) 293-5662

Attorneys for Defendants

UNITED STATES DISTRICT COURT
 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant

Civil Action Number
76-89-S

AFFIDAVIT

I, Gordon G. McNeill, being duly sworn, hereby
 depose and say as follows:

I have been a Special Agent (SA) of the Federal
 Bureau of Investigation (FBI) for approximately eleven years,
 and for the past eight years have been involved in
 investigations in the organized crime field. I am currently
 assigned to FBI Headquarters (FBIHQ), at Washington, D. C.,
 as a Supervisor in the Organized Crime Section, specifically

////

////

2 JUL 20 1977

LEGAL COUNSEL

b6
 b7C

1 that Unit dealing with organized crime in the Western United
2 States. I am thoroughly familiar with the FBI's efforts in this
3 regard including our use of informants, the necessity of main-
4 taining their identities secret and repercussions which could
5 ensue from disclosure of their identities, even inadvertent.

6 As stated in the Affidavit of Special Agent Michael L.
7 Hanigan, dated June 9, 1976, at page six, paragraph seven,
8 "nearly all the documents containing information concerning
9 plaintiff were obtained from an anti-racketeering investigation
10 of John Roselli." Other references to plaintiff were located in
11 files dealing with the broad subject matter of the FBI's criminal
12 intelligence program as it relates to certain FBI Field Offices
13 in California. As previously stated in the Hanigan Affidavit,
14 plaintiff's name appears in a small portion of these documents.
15 These documents are replete with information pertaining to other
16 individuals gathered by high level organized crime informants.
17 Dissemination of the information received from these informants
18 could, in my opinion, place their lives and physical well-being
19 in jeopardy as well as that of their families. Furthermore,
20 disclosure of their identities could severely hinder this
21 Bureau's ability to continue to receive high quality information
22 in this complex area of investigation. These investigations
23 consume years of effort to develop and premature disclosure of
24 some of these sources could affect investigations in progress

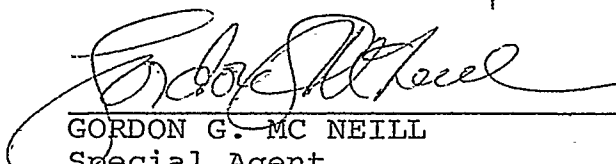
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1 and compromise the future effectiveness of the sources in
2 gathering quality information in the organized crime area.
3
4

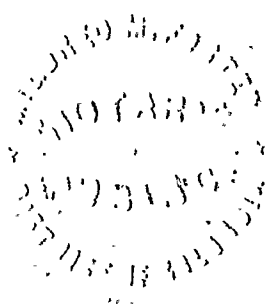
5
6 
7 GORDON G. MC NEILL
8 Special Agent
9 Federal Bureau of Investigation
10 Washington, D. C.

11 Subscribed and Sworn to before me this 13th day of

12 July, 1977.
13

14 Mildred M. Foster
15 Notary Public
16

17 My commission expires My Commission Expires September 14, 1981
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SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION

Defendant.

No. 76-89-S

CERTIFICATE OF SERVICE

BY MAIL

STATE OF CALIFORNIA)

) ss:

COUNTY OF SAN DIEGO)

IT IS HEREBY CERTIFIED that:

I, Nancy Amans, am a citizen of the United States over the age of eighteen years and a resident of San Diego County, California; my business address is 940 Front Street, San Diego, California; I am not a party to the above-entitled action; and

On July 19, 1977, I deposited in the United States mail at San Diego, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of

AFFIDAVIT

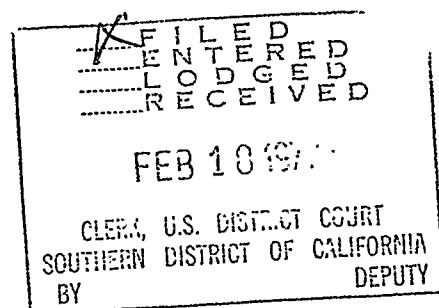
addressed to Richard C. Leonard, Esq., 433 North Camden Drive,
Suite 1200, Beverly Hills, California 90210

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 19th day of July, 19 77.

Nancy Amans



TERRY J. KNOEPP
United States Attorney
CHARLES H. DICK, JR.
Assistant, U. S. Attorney
United States Courthouse
940 Front Street, Rm. 5-N-19
San Diego, California 92189
Telephone: (714) 293-6258

Attorneys for Defendants

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,
Plaintiff,
v.
FEDERAL BUREAU OF
INVESTIGATION, et al.,
Defendants.

Civil No. 76-89-S

STIPULATION FOR CONTINUANCE
OF PRETRIAL CONFERENCE AND
ORDER THEREON

It is hereby stipulated by and between the parties hereto, through their respective attorneys of record, that the Pretrial Conference in the above-captioned matter, presently set for February 22, 1977, at 10:30 a.m., in the courtroom of the Honorable Edward J. Schwartz, United States District Judge, be continued until such date as the court set for oral argument on the pretrial dispositive motions which the parties shall file in accordance with the following schedule and that date shall not be prior to July 1, 1977.

NOT RECORDED

7 MAR 8 1977

Counsel for defendants shall file a motion to dismiss, or in the alternative, for summary judgment by April 29, 1977; counsel for plaintiff shall have 45 days from the date of filing of defendants' motion to file plaintiff's response and cross motion for summary judgment or other relief. Counsel for the parties agree that the

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1 legal issues in this case (i.e., whether the defendants' action in
2 withholding records from plaintiff under provisions of 5 U.S.C.
3 §552(b) and 5 U.S.C. §552(a) is authorized), can be resolved
4 effectively and most expeditiously by the filing of dispositive
5 pretrial motions. Counsel regret that they have been unable to
6 prepare motion papers earlier but due to the urgent nature of other
7 matters in litigation which both attorneys are handling and the
8 fact that both counsel have had to travel continuously during
9 recent months, this delay has been unavoidable. Counsel also wish
10 to bring to the court's attention the continuing efforts by both
11 sides over the past months to narrow the issue before the court
12 through supplementary release of documents by government defendants
13 and frequent telephone discussions between counsel. Counsel
14 strongly believe that this matter does not require a trial and
15 should be disposed of on motion papers supported by affidavits as
16 appropriate.

17 Based on the briefing schedule to which counsel briefly
18 commit themselves subject to the court's approval, counsel
19 respectfully suggest the continuance of the pretrial conference.

20 Dated: February 17, 1977

21 *by JLR*
22 Richard C. Leonard
23 RICHARD C. LEONARD
24 Attorney for Plaintiff

25 TERRY J. KNOEPP
26 United States Attorney

27 Charles H. Dick, Jr.
28 CHARLES H. DICK, JR.
29 Assistant U. S. Attorney
Attorneys for Defendants

30 O R D E R

31 IT IS SO ORDERED this 18 day
32 of February, 1977. FURTHER ORDERED THAT PRETRIAL HEARING HEREIN
SHALL BE HELD JULY 5, 1977, AT 10:30 A.M.

EDWARD J. SCHWARTZ
United States District Judge

MINUTES OF THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

LOCAL & STATE

JUDITH EXNER

vs F. B. I., et al

No. 76-0089-S

Judge

Deputy Clerk

Reporter

XX HON. EDWARD J. SCHWARTZ
HON. HOWARD B. TURRENTINE
HON. GORDON THOMPSON, JR.
HON. LELAND C. NIELSEN
HON. WILLIAM B. ENRIGHT
HON.
HON.

Winora Zinn
Richard Bellman
Victor Mohler
Robert Robinson
Milvoy Mayer
XX Cynthia Freeman

Kathleen Ripley
Jeanette Ruggles
Jean Clarke
Dorothy Albright
Joan King

Asst. U. S. Attorney

NA

Atty	NA	for		Apptd	Retnd
		for		Apptd	Retnd
		for		Apptd	Retnd
		for		Apptd	Retnd
		for		Apptd	Retnd
		for		Apptd	Retnd

PROCEEDINGS:

GOOD CAUSE APPEARING, the Pre-Trial Conference, continued for hearing to Monday, February 21, 1977 by stipulation, is hereby ordered continued to February 22, 1977 and the February 21, 1977 date vacated.

COPIES TO:

Richard C. Leonard, Esq.
433 North Camden Drive
Suite 1200
Beverly Hills, Ca. 90210

Civil Division
U. S. Attorney's Office
San Diego, Ca. 92189

62-116929-

NOT RECORDED

5 DEC 20 1976

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DEC 8 2 12 PM '76

DATE:

INITIALS

Deputy Clerk

54 DEC 21 1976
Form 9

filed 11-15-76

RICHARD C. LEONARD
Attorney at Law
433 North Camden Drive
Suite 1200
Beverly Hills, CA 90210

(213) 278-9750

Attorney for Plaintiff

FEDERAL GOVERNMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,)	CIVIL ACTION NO. 76-89-S
)	
Plaintiff,)	STIPULATION AND ORDER THEREON
)	
-vs-)	
)	
FEDERAL BUREAU OF INVESTIGATION,)	
et al.,)	
)	
Defendants.)	

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective attorneys of record, that the pretrial conference in the above-captioned action, presently set for November 22, 1976, at 10:30 a.m., in the Courtroom of the Honorable Edward J. Schwartz, United States District Judge, be continued to Monday, February 21, 1977, at the same time and place.

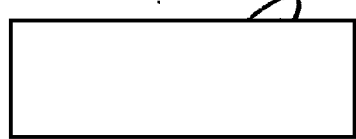
62-116927-

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14 NOV 29 1976

This stipulation is the result of the belief of all counsel to this litigation that the pretrial conference in this matter should be continued. Both parties feel that there is some further work to be done on this case, including discovery and motions to be filed, so as to make the pretrial conference either unnecessary or valueless if it were to be held prior to February of 1977. The actions which counsel believe are outstanding include the following:

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*1976
USA San Diego
California
11/23/76
LFW*



1. The Department of Justice is presently finalizing its appellate review of the documents requested by the plaintiff. Counsel for the Government believes that a compilation of any remaining documents to be submitted to plaintiff and the Court, along with affidavits and other materials, should be completed in the next two or three weeks.

2. Counsel for the Government wishes to file a motion for summary judgment which probably will be completed within the next four to six weeks.

3. Counsel for plaintiff wishes to serve a set of interrogatories on the Government, and to file a motion, pursuant to the Privacy Act of 1974, for the turnover of additional documents.

4. Counsel for plaintiff also wishes to file a motion for summary judgment to be heard simultaneously with the Government's motion.

Based on the further work that must be performed in this action, counsel for all parties feel that the continuance of the pretrial conference as requested is appropriate.

DATED: November 9, 1976.

RICHARD C. LEONARD
Attorney for Plaintiff

DATED: November , 1976.

LYNNE K. ZUSMAN

TERRY J. KNOEPP,
JOHN R. NEECE,

By JOHN R. NEECE
Attorneys for Defendants

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O R D E R

Good cause appearing, IT IS SO ORDERED.

DATED: November 15, 1976.

EDWARD J. SCHWARTZ
UNITED STATES DISTRICT JUDGE

4
1 TERRY J. KNOEPP
United States Attorney
2 JOHN R. NEECE
Assistant U. S. Attorney
3 United States Courthouse, Annex A
325 West F Street
4 San Diego, California 92101
Telephone: (714) 293-5659

5 Attorneys for Defendants

6
7
8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10
11 JUDITH KATHERINE EXNER,)
12 Plaintiff,)
13 v.)
14 FEDERAL BUREAU OF INVESTIGATION,)
15 et al.,)
16 Defendants.)

Civil No. 76-89-S

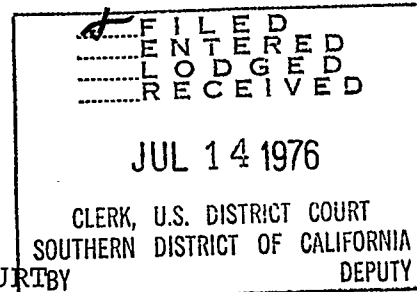
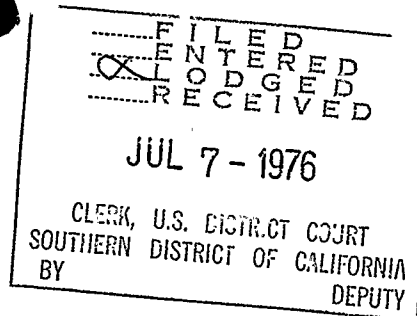
ORDER

17 This matter having come before the court on July 6, 1976,
18 on defendants' renewed motion, pursuant to 5 U.S.C. §552(a)(6)(C),
19 to stay further proceedings pending completion of defendants'
20 appellate administrative review of the documents which have been
21 requested by plaintiff pursuant to 5 U.S.C. §552 and 5 U.S.C.
22 §552(a), and on plaintiff's motion for an order adjudging
23 defendants, and their attorneys of record, guilty of civil contempt,
24 and,

25 The court having been fully advised in the premises,
26 IT IS ORDERED:

- 27 1. Defendants' motion is denied.
28 2. Plaintiff's motion is denied.
29 3. Plaintiff's motion for attorney fees for preparation of
30 the above motion for contempt and opposition to defendants' motion
31 is denied.

32 / / /

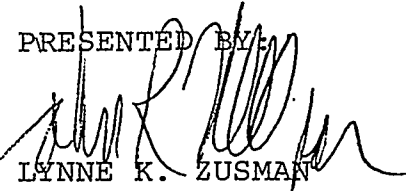


1 IT IS FURTHER ORDERED that the April 9, 1976, and April 20,
2 1976, orders of this court are reaffirmed, and that in accordance
3 therewith defendants shall not disclose to any other person or
4 entity the contents of any of the documents responsive to
5 plaintiff's Freedom of Information and Privacy Act request, except
6 for "routine use" as defined in 5 U.S.C. §552a(a)(7) and 5 U.S.C.
7 §552a(b), until further notice from this court.

8 DATED: 7-7-76

9
10
11 United States District Judge

12 PRESENTED BY:

13 
14 LYNNE K. ZUSMAN
15 On Behalf of Defendants
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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF CALIFORNIA

3 JUDITH KATHERINE EXNER,)
4 Plaintiff,)

No. 76-89-S

5 v.)

6 FEDERAL BUREAU OF INVESTIGATION,)
7 et al.,)

AFFIDAVIT OF SERVICE

8 Defendants.)
9)

BY MAIL

10 STATE OF CALIFORNIA)
11) ss.
12 COUNTY OF SAN DIEGO)

13 I, Elayne Caddy, being first duly sworn, depose
14 and say:

15 That I am a citizen of the United States and a resident
16 of San Diego County, California; that my business address is
17 325 West F Street, San Diego, California; that I am over the age
18 of eighteen years, and not a party to the above-entitled action;

19 That on July 7, 1976, I deposited in the United
20 States mail at San Diego, California, in the above-entitled
21 action, in an envelope bearing the requisite postage, a copy of
22 ORDER
23

24 addressed to Richard C. Leonard, Esq., 433 North Camden Drive,
25 Suite 1200, Beverly Hills, CA 90210

26 the last known address, at which place there is delivery service
27 of mail from the United States Postal Service.
28

29
30 SUBSCRIBED AND SWORN TO before
31 me this 7th day of July, 19 76.

32 Mary Knisley
Notary Public in and for said
county and state

Elayne Caddy
Elayne Caddy



325 West F St., Annex A, San Diego, CA 92101

FBI
Date: 10/14/77

Transmit the following in _____
(Type in plaintext or code)

Via AIRTEL AIRMAIL - REGISTERED
(Precedence)

TO: DIRECTOR, FBI
ATTN: LEGAL COUNSEL DIVISION

FROM: SAC, SAN DIEGO (190-20)

FREEDOM OF INFORMATION (FOIA)
AND PRIVACY ACTS (PA)
LITIGATION

Re Bureau airtel 9/30/77, captioned as above.

In accordance with referenced airtel, enclosed for FBIHQ are one copy each of docket sheets pertaining to Case Number CA # 76-0089; CA # 77-0114-N; CA # 77-0269-N; and CA # 75-0420-N.

2 - Bureau (Enc. 4) (AM-RM)
1 - San Diego

JOT:ejt
(3)

ENCLOSURE
"ENCLOSURE ATTACHED"

EX-108

REC 12

DE-66

62-116929-30

OCT 15 1977

1 OCT 19 1977

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b7c

XEROX
NOV 1 1977

LEGAL COUNSEL

APR 4 1980

54 NOV 23 1977

Sent _____ M Per _____

ENCLOSURE

62-116929-30

OFFICE	YR.	NUMBER	MO.	DAY	YEAR	J	N/S	O	R	23	S	OTHER	NUMBER	DEM.	YR.	NUMBER
74-5	76	0089	02	06	76	2	440	1					7404		76	0089

PLAINTIFFS

DEFENDANTS

JUDITH KATHERINE EXNER

vs

FEDERAL BUREAU OF INVESTIGATION,
CLARENCE M. KELLEY, Director,
Federal Bureau of Investigation,
10th Street and Pennsylvania
Avenue, N.W., Washington, D.C.,
UNITED STATES DEPARTMENT OF
JUSTICE, and EDWARD H. LEVI,
Attorney General of the United
States, Department of Justice
Building, 10th Street and Penn-
sylvania Avenue, N.W.,
Washington, D.C.

CAUSE

Action under Freedom of Information Act, 5 USC 552 as amended by Pub. L. No. 93-504, 88 Stat. 1561, to obtain the files of the B. B. II. on the plaintiff.

RGR

ATTORNEYS

BRIAN D. MONAGHAN
1324 Security Pacific Plaza
1200 Third Avenue
San Diego, California 92101

TERRY J. KNOEPP
U.S. Attorney
325 West "F" Street
San Diego, Calif. 92101

RICHARD C. LEONARD
~~2404 Wilshire Blvd. Century Park East~~
Suite 1800
Los Angeles, Calif. 90057
(213) 380-3330

RICHARD C. LEONARD
433 North Camden Drive
Suite 1200
Beverly Hills, Calif. 90210
(213) 278-9750

<input type="checkbox"/> CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
	2-9-76	70108	2-11-76	JS-5	
				JS-6	

DATE	NR.	PROCEEDINGS
2-6-76	1	Fld complt for injunctive relief. Action under Freedom of Information Act, 5USC 552 as amended by Pub. L. No. 93-504, 88 Stat. 1561 to obtain the files of the F.B.I. on the pltf. JS-5 CARD MADE. Issd. Summons to U.S. Mars.
2-19-76	2	Fld U.S. Mars Svc on complt for injunctive relief as to F.B.I. ret'd exec on 2-17-76.
2-19-76	3	MOTS - Ent ord ex parte mot for Subof atty by RICHARD LEONARD - submitted
2-19-76	4	Fld AMENDED COMPLT for injunctive relief under the privacy act of 1974 and the Freedom of Information Act
	5	Fld NOT OF HRNG on ex parte mot, affidt of JUDITH KATHERINE EXNER in support of pltf's mot for an ex parte ORD, & pltf's ex part mot for an ORD 1) - Requiring the Govt to Respond to the AMENDED COMPLT by 3-1-76; 2) - requiring Govt to produce the FBI files relating to pltf for Crt's in camera inspection by 3-1-76; and 3) - shortening time to serve & file a NOT OF MOT & mot for S/J calendard for 2-23-76 @ 10 a.m.
2-19-76	6	Fld ex parte mot re substitution of atty; affidts of JUDITH KATHERINE EXNER, DANIEL R. EXNER, & RICHARD C. LEONARD. Fld affidt of JUDITH KATHERINE EXNER re substitution of atty. Fld affidt of DANIEL R. EXNER re substitution of atty. Fld affidt of RICHARD C. LEONARD re substitution of atty t/w acknowledgment of svc.
	7	Fld ORD that RICHARD C. LEONARD be substituted for BRIAN D. MONAGHAN as atty for the pltf. (SMITH) Cys mld.
2-23-76	8	MOTS - Ent ord hrng ex parte mot for ORD - ord off calendar. (S)
2-26-76	9	Fld pltf-s - NOT OF MOT & mot for partial S/J (1) - requiring the Govt to produce the FBI Files relating to pltf for the Crt's in camera inspection; & (2) - for an ORD making pltf's FBI Files available to her under the Privacy Act of 1975 calendard for 3-8-76 @ 10:30 a.m. t/w affidt of svc by mail thereto. LODGED pltf's - Proposed Findings of Undisputed Facts & Conclusions of Law & Proposed Partial S/J. (Sent to Judge SCHWARTZ this date).
3-3-76	10	Fld opposition to pltf's mot for Partial S/J t/w affidt of svc by mail.
3-8-76	11	MOTS - Ent ord hrng mots cont'd to 3-15-76 @ 10:30 a.m. (S)
3-15-76	12	MOTS - Ent ord hrng mot for partial S/J - DENIED; mot to produce FBI files, mot for ORD making pltf's FBI files availabla - Got to file ANSWER by 4-10-76. Pltf to prepare ORD. (S) (ENT 4-9-76)
3-25-76	---	LODGED ORD re defts' ANSWER to Amended Compt.
3-31-76	13	Fld deft's objection to proposed ORD t/w affidt of svc by mail.
4-9-76	14	Fld Summons as to USA ret'd exec on 2-17-76.
4-9-76	15	Fld ORD defts shall file ANSWERS to AMENDED complt by 4-12-76; by 4-12-76 defts shall file w/ Crt affidt/affidts containg info as described in Vaughn v. Rosen, 484 F.2d 820, 826-828 (D.C. Cir., 1973). Pltf's mot for Partial S/J is DENIED. (S) (ENT 4-9-76)
4-12-76	16	LODGED ord staying proc pending complt of review of documents req by pltf. Fld defts Mot to stay pending completion of review; w/affid of Quinlan J. Shea, Jr.; Affid of Michael L. Hanigan.; Defts memo in supp.
4-12-76	16	Ent ord Gov't mot to stay proceedings granted given 15 days addistional to comply w/ ct ord. (S)

-cont-

ORIGINAL DOCKET

VS

F. B. I., et al

(2)

DATE	PROCEEDINGS
4-16-76	(17) Fld pltf not of ruling t/w affid of serv.
4-19-76	18 - Fld Defts ex parte application for order shortening time for filing mot to stay pending appeal w/order (S); Notice of motion for 4-20-76 @ 10:30 a.m.; motion to stay pending appeal, memo of pts & auths w/affid of serv. LODGED - Proposed order.
4-20-76	19- Fld exhibits in opposition to Govt's mot to Stay Action Pending Appeal t/w acknowledgment of svc. 20- Ent ord - Hrng mot for stay pending appeal 1)- Fld ORD DENYING deft's mot of 4-12-76; 2)- Fld Govt's NOTICE OF APPEAL of ORD; & 3)- Mot for Stay pending appeal - DENIED.. Pltf to prepare ORD. (S) 21- Fld ORD that deft's mot to stay further proceedings pending completion of defts' review of documents requested by pltf - mot is DENIED. FUR ORD defts' have an additional 15 days,, to & including 4-27-76, to file their ANSWERS to AMENDED COMPLT, & defts have an additional 15 days, up to & including 4-27-76, to comply w/ provisions of ORD entered on 4-9-76, relating to flg of affidts as desciebed in para 2 & subpara 2.1 to 2.4 of th 4-9-76 ORD. (S) (ENT 4-20-76)
4-20-76	22 - Fld Defts Notice of Appeal.
4-21-76	23 - Fld Defts Designation of Record on Appeal. Rule 11g
APR 21 1976	Mld repts trans t/w Clerk's record to USCA <i>an emergency submission</i>
4-21-76	24- Fld ANSWER to complt t/w affidt of svc by mail.
4-26-76	25 - Fld Appellee's counter-designation of record on appeal. Rule 11g mailed cys of designated documents to USCA - emergency submission 26 - Fld Defts regular Designation of record on Appeal. (Mld cys.)
4-27-76	- Fld Reporter's Transcript of mot to stay pending completion of review of 4-12-76 (Dona L. McQueeney CSR) (Orig +1) cy given to atty. Fld Reporter's Transcript of hrg mot to stay pending appeal of 4-20-76 (Donna L. McQueeney CSR) (Orig +1) cy given to atty.
4-27-76	27 - Fld Order that Defts motion to stay further proceedings pending appeal is denied. (S)
5-3-76	- Recd c.c. order of USCA staying courts orders of 4-9-76 & 4-20-76 temporarily. Appellant shall file transcripts on or before 4-30-76. Appellee is req. to file response to mot for stay on or before 5-4-76.
5-6-76	- Fld Reporters transcript of motion for summary judgment on 3-15-76 (Ruanne McArthur, CSR) 1 Vol. Orig + 2 cys.)
6-3-76	28- Fld notice of ruling from USCA t/w affidt of svc.
6-9-76	29- Fld Cost Bill & Verification, t/w proof of svc.
6-10-76	30- Fld NOT OF HRNG on mot to Tax Costs calendared for 6-21-76 @ 10 a.m. t/w proof of svc by mail.
6-10-76	31- Fld Report to the Crt from Crt ORDS entered 4-9-76 & 4-20-76 & USCA's ORD entered 5-26-76. 32- Fld NOT OF MOT to Stay Pending Completion of Review calendared for 7-6-76 @ 10:30 a.m. t/w affidt of svc by mail.

DATE	PROCEEDINGS
5-10-76	-----LODGED ORD re: renewed mot to Stay further proceedings pending completion of review in matter.
JUN 1 1976	re: No. 100-44212 CLK's record to USCA
5-21-76	-----Fld Cost Bill & Verification Taxed in sum of \$18.75. (CLK)
5-23-76	33- Fld pltf's MOT for an OR adjudging defts. & their attys of record, Guilty of Civil Contempt, affidt of RICHARD C. LEONARD, & MEMO of P/As calendared for 7-6-76 @ 10:30 a.m. t/w proof of svcs by mail.
5-28-76	34- Fld pltf's opposition to defts' mot for a stay t/w proof of svc.
7-6-76	35- Fld deft memo in supp of their opposition to pltf's mot to adjudge defts & their attys of record, Guilty of civil contempt t/w cert of serv.
	36- HRG MOTS- Ent ord hrg pltf's mot for ord adjudging defts & their attys of record, guilty of civil contempt-denied. Hrg defts mot to stay pending completion of review-denied. Pltf to prepare ord. Ct. ords addtl documents turned over to pltf not be made public. (S).
7-7-76	LODGED- Order re hrg on 7-6-76.(sent to Judge S)
7-14-76	37- Fld defts Order that (1) defts mot to stay pending completion of review- Denied.(2) pltf's mot to adjudge defts & their attys of record, guilty of civil contempt- Denied.(3)pltf's mot for atty fees for preparation of above mot- Denied.Fur ord that orders of 4-9 & 20, 1976 are reaffirmed, & defts not disclose to any person the contents of documents responsive to pltf's Freedom of Info & Privacy Act. (S)t/w affid of serv
9-28-76	38- Fld Not of Pre-Trial hrg set for 11-22-76 @ 10:30am. mld cys.
11-15-76	39- Fld pltf stip & ord thereon that pretrial conf set 11-22-76 @ 10:30am be cont to 2-21-77 @ 10:30am.(S)
2-22-76	- Received copy of opinion from USCA remanding cause to USDC. - Received c.c. of order declining to award costs or fees to either side. Costs are to abide the final determination of the case in the district court.
2-26-76	40- Ent ord pre-trial conf cont for 2-21-77 cont by stip to 2-22-77 & 2-21-77 date vacated. (S)
1-30-76	Rec'd c.c. of judgment from USCA remanding decision of USDC.
2-3-76	41- Fld notice of hrg reqst to flg c.c. of judgment of USCA remanding cause to USDC on 12-20-76 @ 10:30am.mld cys.
2-20-76	42- Ent ord hrg reqst flg c.c. judgment of USCA remanding cause to USDC Ord fld. (S)
	43-Fld c.c. of judgment from USCA remanding cause to USDC. (Ent 12-21-76)
1-18-77	44- Fld defts stip for cont of pre-trial conf set 2-22-77 be held 7-5-77 @ 10:30am. (S).

-cont-

62-116929-30

D. C. 109

UNITED STATES GOVERNMENT

Memorandum

TO : Assistant Director
Records Management Division

DATE: 11/4/77

FROM : Legal Counsel *RAM*
PSB

SUBJECT: JUDITH K. EXNER v.
FEDERAL BUREAU OF INVESTIGATION
(U.S.D.C., S.D. CALIFORNIA)
CIVIL ACTION NUMBER 76-0089-S

Judith Katherine Eileen
Immoor Exner

Assoc. Dir. _____
Dep. AD Adm. _____
Dep. AD Inv. _____
Asst. Dir.:
Adm. Serv. _____
Crim. Inv. _____
Fin. & Pers. _____
Ident. _____
Intell. _____
Laboratory _____
Legal Coun. _____
Plan. & Insp. _____
Rec. Mgnt. _____
Spec. Inv. _____
Tech. Servs. _____
Training _____
Public Affs. Off. _____
Telephone Rm. _____
Director's Sec'y _____

PURPOSE:

To record dismissal of instant litigation in favor of the

Government.

DETAILS:

Plaintiff, alleged acquaintance of certain known organized crime figures and of the late President, John F. Kennedy, sought to gain access to certain documents pursuant to the Freedom of Information Act by letter dated 12/24/75. Plaintiff requested expeditious processing of her request since, as she alleged, her life was in jeopardy. Pursuant to Court Order, the contested documents were processed and released expeditiously, as opposed to our normal chronological processing. Thereafter, the issue of delay in processing, based on exceptional circumstances was raised in the United States Court of Appeals for the Ninth Circuit. (See Legal Counsel memo to Assistant Director, Records Management Division, dated 10/29/76.) By subsequent Court Order, dated 8/18/77, contested documents were submitted to the Court by defendant for an in camera inspection. After reviewing these documents in camera, the Court, on 10/18/77, sustained Government's position regarding application of exemptions to the documents.

The Court's action was made known to us by Memorandum and Order Granting Motion For Summary Judgment and Judgment signed by United States District Court Judge

Enclosure

1 - [redacted]

Attn: [redacted]

1 - Mr. Mintz

1 - [redacted]

REC 68

ST-138

(OVER)

ENCLOSURE

ENCLOSURE ATTACHED

EPM/HJR:wsa/100
(4)



50 DEC 1 1977

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

FBI/DOJ

Legal Counsel Memo to Assistant Director
Records Management Division
Re: JUDITH K. EXNER
v. FBI, etc.

Edward J. Schwartz on 10/17/77. Copies of these Court documents are attached.

RECOMMENDATION:

None. For information.

efm

APPROVED:

Director _____
Assoc. Dir. _____
Dep. AD Adm. _____
Dep. AD Inv. _____

Adm. Serv. _____
Crim. Inv. _____
Fin. & Pers. _____
Ident. _____
Intell. _____
Laboratory _____

Legal Coun. *JAM*
Plan. & Insp. *ADD*
Rec. Mgnt. *ADD*
Spec. Inv. _____
Tech. Servs. _____
Training _____
Public Affs. Off. _____

ENCLOSURE 391

62-116929-31

U. S. DEPARTMENT OF JUSTICE
SOUTHERN DISTRICT OF CALIFORNIA

RETURN IN FIVE DAYS TO

OFFICE OF

UNITED STATES ATTORNEY

U. S. COURTHOUSE

940 FRONT STREET, ROOM 5-N-19

SAN DIEGO, CALIFORNIA 92189

OFFICIAL BUSINESS

PENALTY FOR PRIVATE USE \$300

POSTAGE AND FEES PAID
U. S. DEPARTMENT OF JUSTICE
JUS-431



Federal Bureau of Investigation
Washington, D.C. 20535

Attn: Director

Backshots DM
Secy. _____
Atty. _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

WILLIAM W. LUDDY
CLERK

OFFICE OF THE CLERK
303 U.S. COURT HOUSE
SAN DIEGO, CALIFORNIA 92101

RICHARD C. LEONARD
433 North Camden Drive
Suite 1200
Beverly Hills, California 90210

TERRY J. KNOEPP
U.S. Attorney

RE: JUDITH KATHERINE EXNER
vs. Civil 76-0089-S
FEDERAL BUREAU OF
INVESTIGATION, et al.,

You are hereby notified that Memorandum and Order Granting
Motion for Summary Judgment and Judgment,
in each of the above-entitled cases was xFiled xEntered on
October 18, 1977.

x Copy enclosed Copy not enclosed.

When the time for appeal has expired (without appeal being taken),
counsel must arrange for pickup of their exhibits without further
notice. Unless you respond within thirty days, they will be
destroyed or otherwise disposed of pursuant to Local Rule 20(a).

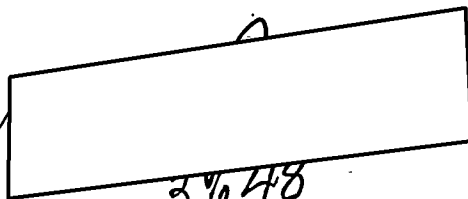
I hereby certify that this notice was mailed on October 19, 1977.

WILLIAM W. LUDDY, Clerk

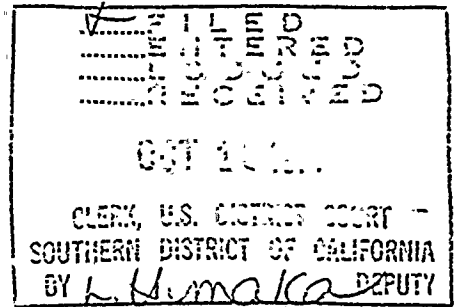
By L. Humala
Deputy Clerk

FILED OCT 19 1977

OCT 19 1977



b6
b7C



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,
Plaintiff
v.
FEDERAL BUREAU OF
INVESTIGATION, et al.,
Defendants.

Civil No. 76-89-S
MEMORANDUM AND ORDER
GRANTING MOTION FOR
SUMMARY JUDGMENT

Defendants have moved to dismiss the complaint herein, or, in the alternative, for summary judgment. The court has considered all pleadings filed by the parties in connection with these motions as well as all affidavits included therewith or incorporated therein by reference.

Plaintiff's action was brought under the Freedom of Information Act, 5 U.S.C. §552, and the Privacy Act of 1974, 5 U.S.C. §552a, demanding certain records pertaining to her in the possession of the Federal Bureau of Investigation.

Pursuant to orders of this court entered April 9, 1976, and April 20, 1976, defendants were ordered to make a report and to file an affidavit or affidavits containing the type of information contemplated by Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973). On June 10, 1976, defendants filed a Report to the Court incorporating an affidavit by Michael L.

1 Hanigan, Special Agent of the Federal Bureau of Investigation
2 assigned in a supervisory capacity to the Freedom of Information
3 - Privacy Acts. The Hanigan affidavit set forth the search pro-
4 cedure used and the exemptions applied, and appended an inven-
5 tory Exhibit "A" detailing the documents released to plaintiff,
6 the excisions and exclusions from such release and the reasons
7 and exemptions therefor claimed under the applicable statutes.
8 As to the documents and portions of documents not released, de-
9 fendants asserted exemptions under the Privacy Act and pursuant
10 to the Freedom of Information Act, namely 5 U.S.C. §552(b)(2);
11 (b)(5); (b)(7)(C); (b)(7)(D); and (b)(7)(F). Defendants have
12 released to plaintiff the documents and portions of documents
13 described as released in said inventory Exhibit "A" as well as
14 some additional material later released to plaintiff. Of a
15 total of ninety-two documents identified in response to plain-
16 tiff's request, defendants have released to her eighty-six doc-
17 uments in whole or in part.

18 Defendants' motion to dismiss, or, in the al-
19 ternative, for summary judgment came on for hearing and was
20 fully argued by counsel on August 1, 1977, whereupon the court
21 ordered that all the documents in question in possession of the
22 defendants be made available for an in camera inspection by the
23 court. Pursuant to such order, the documents have been made
24 available and have been examined by the court. The documents
25 in question are a part of voluminous organized crime investiga-
26 tion reports containing great quantities of material which do
27 not pertain in any way to plaintiff and which are wholly outside
28 the scope of her request for disclosure. Thus, plaintiff appears
29 only as a minor figure in a great mass of investigatory material
30 comprising the documents examined by the court. In reviewing
31 the documents, the court has considered each of the claimed
32 exemptions as well as the appropriate balancing test where

1 applicable to the (b)(7)(C) claims and has weighed the individ-
2 ual privacy loss that would be occasioned by disclosure as op-
3 posed to the public interest purposes that would be promoted by
4 disclosure.

5 After thorough consideration of the points and
6 authorities filed and the argument made by respective counsel as
7 well as the in camera inspection of the documents in question,
8 the court makes the following findings, conclusions and order:

9 1. Because the material sought by plaintiff
10 may be wholly exempt from disclosure under the Privacy Act due
11 to the investigatory records exemption embodied in 5 U.S.C.
12 §552a(j)(2), the Privacy Act should be construed in conjunction
13 with the Freedom of Information Act's exemptions. Plaintiff's
14 request was, therefore, properly processed under the Freedom of
15 Information Act.

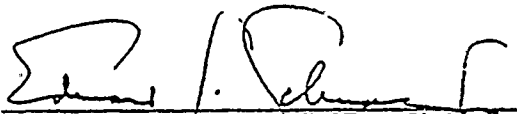
16 2. The documents and portions of documents
17 not released to plaintiff have been properly withheld in accord-
18 ance with the detailed exemptions claimed by defendants.

19 3. Defendants have made the maximum reasona-
20 ble disclosures to plaintiff of the documents in question, and
21 plaintiff has received the documents and portions of documents
22 to which she is reasonably entitled under the Privacy Act and
23 the Freedom of Information Act.

24 4. There is no genuine issue remaining as to
25 any material fact and defendants are entitled to judgment as a
26 matter of law.

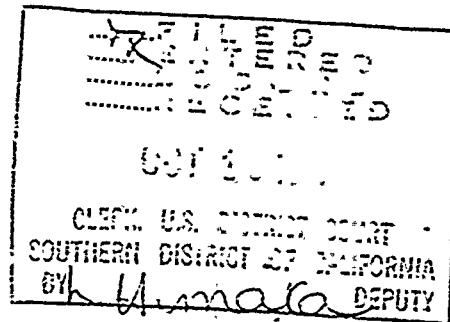
27 Wherefore, IT IS HEREBY ORDERED that defen-
28 dants' motion for summary judgment be and the same is hereby
29 granted.

30 DATED: October 18, 1977.

31 
32 EDWARD J. SCHWARTZ, Chief Judge
United States District Court



62-116929



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,
Plaintiff
v.
FEDERAL BUREAU OF
INVESTIGATION, et al.,
Defendants.

Civil No. 76-89-S
J U D G M E N T

The court having granted defendants' motion
for summary judgment herein,

IT IS ORDERED, ADJUDGED AND DECREED that the
above-entitled matter be and the same is hereby dismissed.

DATED: October 18, 1977.

Edward J. Schwartz
EDWARD J. SCHWARTZ, Chief Judge
United States District Court

UNITED STATES GOVERNMENT

Memorandum

TO : DIRECTOR, FBI (62-116929)

DATE: 11/3/77

FROM : SAC, SAN DIEGO (66-1761) (RUC)

SUBJECT: JUDITH KATHERINE EXNER
vs. FBI, ET AL
(U.S. DISTRICT COURT,
SAN DIEGO, CALIFORNIA)
CIVIL ACTION 76-0089-S

62-116929-25
Re Bureau airtel to San Diego dated 8/11/77.

On 10/18/77, Chief Judge EDWARD J. SCHWARTZ,
U.S. District Court, Southern District of California,
at San Diego, California, ordered that the FBI's motion
for a summary judgment be granted and that EXNER's suit
based upon the Privacy Act be dismissed.

For the above reasons, San Diego considers this
matter closed to be reopened in the event that further
appeal is taken by the plaintiff.

② - Bureau
1 - San Diego

PBA:jaa
(3)

EX-136

REC- 85

1167-116929-32

9 NOV 7 1977

b6
b7C

3648



57 NOV 25 1977

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

FBI

Date: 11/10/77

Transmit the following in _____
(Type in plaintext or code)Via AIRTEL AIRMAIL - REGISTERED
(Precedence)

TO: DIRECTOR, FBI
ATTN: LEGAL COUNSEL DIVISION

FROM: SAC, SAN DIEGO (190-20)

FREEDOM OF INFORMATION (FOIA)
AND PRIVACY ACTS (PA)
LITIGATION

Re Bureau airtel 9/30/77, captioned as above; and
San Diego airtel to Bureau 10/14/77.

A review of the records of the Clerk of the U.S. District Court, San Diego, California, concerning cases for which docket sheets were furnished to the Bureau in referenced San Diego airtel and in accordance with instructions set forth in referenced Bureau airtel, reveals that:

Concerning cases numbered 77-0114-N and 75-0420-N, no new documents have been filed with the Court pertaining to these cases during the preceding 30 day period which the Bureau is not already aware.

Concerning case number 76-0089, on 10/18/77, EDWARD J. SCHWARTZ, Chief Judge, U.S. District Court, Southern District of California, granted the defendants motion for a summary judgment and ordered, adjudged and decreed that this case, concerning JUDITH KATHERINE EXNER, plaintiff vs. Federal Bureau of Investigation, Et Al, defendants, be dismissed.

Concerning case 77-0269-N, on 10/21/77, the Attorney for the plaintiff, CARROL SAMUEL SCHACHT, filed with the U.S. District Court, Southern District of California, a Complaint Amended for Injunctive Relief under

- ② - Bureau (AM-RM)
1 - San Diego

JOT:ejt

Approved: (3)

Special Agent in Charge

NOV 23 1977

Sent

M Per

NOV 14 1977

11-22

FBI - SAN DIEGO

590-992

197-260-1

RECORDED

33

SD 190-20

the Privacy Act of 1974 and the Freedom of Information Act, the defendants being the Agent Federal Bureau of Investigation, Central Intelligence Agency, Department of Commerce, the U.S. Civil Service Commission, Department of Justice, and the Veterans Administration.

OUTSIDE SOURCE

August 10, 1977

b6

1 - Mr. Mintz
Attention:

Richard C. Leonard, Esq.
Suite 1200
433 North Camden Drive
Beverly Hills, California 90210

Dear Mr. Leonard:

Reference is made to the Freedom of Information-
Privacy Acts request of your client, Judith Campbell Exner,
and subsequent litigation.

Please be advised that an examination of the
documents within our central records in preparation for
the court ordered in camera review has revealed several
instances where your client's name appears on a page of a
document which was heretofore not considered for release.
This oversight was due, in most instances, to the fact that
the initial processing of these documents had overlooked an
index at the very end of several FBI reports and had instead
relied only on the table of contents at the beginning of
these reports as the guide in locating the specific pages within
the document which contained information pertaining to your
client. These additional references to her name have now been
processed pursuant to the Freedom of Information Act (FOIA).
Several additional "administrative" or "cover pages" and synopses
of FBI reports which contain a reference to or mention of her
name, have also been processed for release. In one instance, a
document was withheld which contained substantially the same
information as another document previously released. The former
is now being released consistent with the release of the latter.

7 JAN 25 1978

In conversation with Ms. Lynne K. Zusman of the
Department of Justice, you expressed the desire of your
client to have FBI records relative to Ms. Exner reprocessed
for the release of any administrative material no longer
exempt under Title 5, United States Code, Section 552 (b) (2).
Those records consisting of 29 pages containing excisions wherein
exemption (b) (2) was cited have now been reprocessed and are
enclosed.

Assoc. Dir. _____
Dep. AD Adm. _____
Dep. AD Inv. _____
Asst. Dir.:
Adm. Serv. _____
Crim. Inv. _____
Fin. & Pers. _____
Ident. _____
Intell. _____
Laboratory _____
Legal Coun. _____
Plan. & Insp. _____
Rec. Mgmt. _____
Spec. Inv. _____
Tech. Servs. _____
Training _____
Public Affs. Off. _____
Telephone Rm. _____
Director's Sec'y _____

cer:jmd (4)

MAIL ROOM ☐

TELETYPE UNIT ☐

SEE NOTE PAGE THREE

FBI/DOJ

Richard C. Leonard, Esq.

An additional 73 pages of new material from our records are also enclosed. Please note that the majority of these pages are from the Table of Contents or Index as mentioned above and contain no substantive information concerning your client.

Sincerely yours,
C. M. Kelley

Clarence M. Kelley
Director

Enclosures (61)

Richard C. Leonard, Esq.

NOTE: In connection with the litigation related to the Judith Campbell Exner FOIPA request, the court ordered an in camera inspection. A copy of records pertaining to Ms. Exner have been prepared for the court and arranged in the order of Exhibit A of the affidavit of SA [REDACTED] [REDACTED] dated 6/9/76. In addition, Ms. Exner's attorney acting in her capacity, informed Departmental Attorney Lynne Zusman that his client wanted all FBI records pertaining to her wherein (b)(2) material was excised to be reprocessed under recent guidelines set forth by the Deputy Attorney General. In reviewing our records, it was discovered that certain pages in some reports containing information relating to Ms. Exner had not been considered in previous releases, as a result of reliance upon a table of contents to identify pages wherein data relevant to the request appeared. This has resulted in the release of 73 additional pages, consisting mostly of table of contents and index pages. In addition to the above 73 additional pages, 29 previously released pages with excisions of (b)(2) material have also been reprocessed under present guidelines and released for a total supplemental release of 102 pages (61 documents).

b6
b7c

FBI

TRANSMIT VIA:

☐ Teletype
☐ Facsimile
☐ Airtel

PRECEDENCE:

☐ Immediate
☐ Priority
☐ Routine

CLASSIFICATION:

☐ TOP SECRET
☐ SECRET
☐ CONFIDENTIAL
☐ E F T O
☐ CLEAR

Date 2/1/78

AIRTEL

TO: DIRECTOR, FBI (62116929)
 ATTN: LEGAL COUNSEL DIVISION

FROM: SAC, SAN DIEGO (66-1761) *(B)*

6

JUDITH KATHERINE EXNER
 VS. FBI, ET AL
 (U.S. DISTRICT COURT,
 SAN DIEGO, CALIFORNIA)
CIVIL ACTION 76-0089-S

EW

Enclosed herewith for the Bureau are one copy
 each of the following documents:

Notice of Appeal

Plaintiff JUDITH KATHERINE EXNER's
 Designation of Record on Appeal
 From Final Judgment

Resistance to Application
 For Attorney Fees

Judgment Awarding Attorney Fees
 And Costs

Memorandum Opinion

22 FEB 3 1978

For the information of the Bureau, the U. S. Attorney's Office, San Diego, advised that they were communicating with the Department regarding the appeal for the awarding of attorney fees.

The Bureau will be kept advised.

2 - Bureau (Enc. 5)
 1 - San Diego

ENCLOSURE

FEB 3 2 11 PM

LEGAL COUNSEL

3648

JRR/jt

(3)

Approved: *[Signature]*

Transmitted

(Number)

(Time)

Per

58 MAR 14 1978

1 RICHARD C. LEONARD
2 Attorney at Law
3 433 North Camden Drive
4 Suite 1200
5 Beverly Hills, CA 90210
6 (213) 278-9750
7 Attorney for Plaintiff

RECEIVED
DEC 15 1977
UNITED STATES ATTORNEY
SAN DIEGO, CALIFORNIA

DEC 15 1977

Dockets 614

3027

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10
11 JUDITH KATHERINE EXNER,) CIVIL NO. 76-89-S
12 Plaintiff,) NOTICE OF APPEAL
13 -vs-)
14 FEDERAL BUREAU OF INVESTI-)
15 GATION, et al.,)
16 Defendants.)

17
18 NOTICE IS HEREBY GIVEN that plaintiff Judith Katherine
19 Exner hereby appeals to the United States Court of Appeals for the
20 Ninth Circuit from the Final Judgment entered in this action on
21 October 18, 1977.

22 DATED: December 13, 1977.

23
24 
25 RICHARD C. LEONARD

26
27
28
62-116929-35

ENCLOSURE

(VERIFICATION — 446, 2015.5 C. C. P.)

STATE OF CALIFORNIA, COUNTY OF

I am the _____

In the above entitled action or proceeding, I have read the foregoing _____

and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

Executed on _____ (date) at _____ (place), California

I declare, under penalty of perjury, that the foregoing is true and correct.

Signature _____

PROOF OF SERVICE BY MAIL (1013a, 2015.5 C. C. P.)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is: I am employed in the office of a member of the Bar of this Court, at whose direction the service was made; my business address is 433 N. Camden Dr., Suite 1200, Beverly Hills, CA 90210

On December 13, 1977, I served the within NOTICE OF APPEAL

on the defendants
in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail
at Beverly Hills, California
addressed as follows:

Terry J. Knoepp, Esq.
Charles H. Dick, Jr., Esq.
U. S. Courthouse, Annex A
325 West F Street
San Diego, CA 92101

Lynne K. Zusman, Esq.
Department of Justice
Washington, D.C. 20530

Executed on December 13, 1977 at Beverly Hills, California

I declare, under penalty of perjury, that the foregoing is true and correct.

Signature
PAULA G. SCHWARTZ

1 RICHARD C. LEONARD
2 Attorney at Law
3 433 North Camden Drive
4 Suite 1200
5 Beverly Hills, CA 90210
6
7 (213) 278-9750
8 Attorney for Plaintiff

RECEIVED
DEC 15 1977
UNITED STATES ATTORNEY
SAN DIEGO, CALIFORNIA

Doclets
Seal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

11 JUDITH KATHERINE EXNER,) CIVIL NO. 76-89-S
12 Plaintiff,)
13 -vs-) PLAINTIFF JUDITH KATHERINE EXNER'S
14 FEDERAL BUREAU OF INVESTI-) DESIGNATION OF RECORD ON APPEAL
15 GATION, et al.,) FROM FINAL JUDGMENT
16 Defendants.)

17
18 Defendant, Judith Katherine Exner, hereby designates
19 the following papers and records to be incorporated in the record
20 on appeal and transported to the Clerk of the United States
21 Court of Appeals for the Ninth Circuit:

22 1. Amended Complaint for Injunctive Relief Under the
23 Privacy Act of 1974 and the Freedom of Information Act, filed
24 February 19, 1976.

25 2. Plaintiff's Ex Parte Motion for an Order: (1)
26 Requiring the Government to Respond to the Amended Complaint by
27 March 1, 1976; (2) Requiring the Government to Produce the FBI
28 Files Relating to Plaintiff for the Court's In Camera Inspection

1.

62-116929-35
ENCLOSURE

1 by March 1, 1976; and (3) Shortening Time to Serve and File a
2 Notice of Motion for Summary Judgment, filed February 19, 1976.
3 3. Affidavit of Judith Katherine Exner in Support of
4 Plaintiff's Motion for an Ex Parte Order, filed February 19, 1976.
5 4. Notice of Motion and Motion for Partial Summary
6 Judgment (1) Requiring the Government to Produce the FBI Files
7 Relating to Plaintiff for the Court's In Camera Inspection; and
8 (2) for an Order Making Plaintiff's FBI Files Available to Her
9 Under the Privacy Act of 1974, filed on or about February 26, 1976.
10 5. Opposition to Plaintiff's Motion for Partial Summary
11 Judgment, filed March 3, 1976.
12 6. Objection to Proposed Order, filed on or about March
13 31, 1976.
14 7. Order, filed April 9, 1976.
15 8. Motion to Stay Pending Completion of Review, filed
16 April 12, 1976.
17 9. Ex Parte Application for an Order to Shorten Time
18 for Filing Motion to Stay Pending Appeal, filed on or about April
19 14, 1976.
20 10. Notice of Ruling, filed April 16, 1976.
21 11. Exhibits in Opposition to Government's Motion to
22 Stay Action Pending Appeal, filed April 20, 1976.
23 12. Order, filed April 20, 1976.
24 13. Notice of Appeal, filed April 20, 1976.
25 14. Answer to Complaint, filed on or about April 21,
26 1976.
27 15. Notice of Ruling, filed June 3, 1976.
28 16. Renewed Motion to Stay Pending Completion of Review,

1 filed on or about June 10, 1976.

2 17. Report to the Court, filed on or about June 10,
3 1976.

4 18. Plaintiff's Opposition to Defendants' Motion for a
5 Stay, filed June 28, 1976.

6 19. Order, filed on or about July 7, 1976.

7 20. Defendants' Motion to Dismiss, or in the Alternative,
8 for Summary Judgment, filed May 5, 1977.

9 21. Plaintiff's Opposition to Government's Motion for
10 Summary Judgment; Request for In Camera Inspection of FBI Docu-
11 ments; Memorandum of Points and Authorities in Support Thereof;
12 Supplemental Affidavit of Judith Katherine Exner; Affidavit of
13 Richard C. Leonard, filed June 23, 1977.

14 22. Affidavit of Gordon G. McNeill, filed July 19, 1977.

15 23. Defendants' Reply Brief, filed July 29, 1977.

16 24. Memorandum and Order Granting Motion for Summary
17 Judgment, filed October 18, 1977.

18 25. Judgment, filed October 18, 1977.

19 26. Plaintiff's Motion for Award of Attorney's Fees;
20 Affidavit of Richard C. Leonard, filed November 30, 1977.

21 27. Notice of Appeal, filed concurrently with this
22 Designation.

23 28. This Designation of Record on Appeal.


24
25 In addition to the record of the Clerk in this matter,
26 plaintiff further requests that the following Reporter's Tran-
27 scripts of Proceedings also be filed with the Court:

28 1. Reporter's Transcript of Proceedings, March 15, 1976.

1 2. Reporter's Transcript of Proceedings, April 12,
2 1976.

3 3. Reporter's Transcript of Proceedings, April 20,
4 1976.

5 DATED: December 13, 1977.

6
7 
8 RICHARD C. LEONARD
9 Attorney for Plaintiff,
10 Judith Katherine Exner
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(VERIFICATION — 446, 2015.5 C. C. P.)

STATE OF CALIFORNIA, COUNTY OF

I am the _____

In the above entitled action or proceeding, I have read the foregoing _____

and know the contents thereof; and I certify that the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe it to be true.

Executed on _____ at _____, California
(date) (place)

I declare, under penalty of perjury, that the foregoing is true and correct.

Signature

PROOF OF SERVICE BY MAIL (1013a, 2015.5 C. C. P.)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is: I am employed in the office of a member of the Bar of this Court, at whose direction the service was made; my business address is ~~433 North Camden Drive, Suite 1200, Beverly Hills, CA~~

On December 13, 19 77, I served the within PLAINTIFF JUDITH KATHERINE

EXNER'S DESIGNATION OF RECORD ON APPEAL FROM FINAL JUDGMENT

on the defendants
In said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Beverly Hills, California
addressed as follows:

Terry J. Knoepp, Esq.
Charles H. Dick, Jr., Esq.
U. S. Courthouse, Annex A
325 West F Street
San Diego, CA 92101

Lynne K. Zusman, Esq.
Department of Justice
Washington, D.C. 20530

Executed on December 13, 1977 at Beverly Hills, California
(date) (place)

I declare, under penalty of perjury, that the foregoing is true and correct.


PAULA G. SCHWARTZ
Signature


1 FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974, 94th CONG., 1st
2 SESS., at 171, 202, 243-43 (Joint Comm. Print, March 1975).

3 4. There is nothing in the record of this case to suggest
4 that the plaintiff's suit brought about production of any
5 information that she otherwise would not have received. While
6 filing suit may have affected the timing of production, there is
7 no basis to conclude that the plaintiff has acted as a private
8 attorney general and compelled production of information which
9 wrongfully was being withheld. Indeed, once the administrative
10 machinery processed her requests, information was produced; and
11 this court affirmed the government's position with respect to
12 the only information that ever was withheld.

13 5. To argue that the plaintiff has substantially prevailed
14 in compelling production of information wrongfully withheld, is
15 to contend post hoc, ergo propter hoc. This court should reject
16 such a suggestion and disallow recovery of attorney fees. See,
17 Cameron v. Central Intelligence Agency, Civil No. C76-1741A (N.D.
18 Ga., filed November 17, 1977) [attached as Exhibit "A"].

19 DATED: December 12, 1977

20 TERRY J. KNOEPP
21 United States Attorney

22 
23 CHARLES H. DICK, JR.
24 Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FILED IN CLERK'S

NOV 17 1977

SEN. H. CARTER, CL
By: *[Signature]*

Deputy C

RONDO EMMETT CAMERON

vs.

CIVIL NO. C76-1741A

CENTRAL INTELLIGENCE AGENCY
and GEORGE BUSH, Director

ORDER

This civil action is before the court on plaintiff's motion pursuant to rule 59(e) of the Federal Rules of Civil Procedure to alter or amend the judgment for the defendant entered herein on September 30, 1977, insofar as it fails to include an award of costs and attorney's fees to the plaintiff.

Plaintiff's motion is predicated upon 5 U.S.C. § 552(a)(4)(E) of the Freedom of Information Act [hereinafter "FOIA"], which authorizes a court to award reasonable attorney fees and other litigation costs in any case where the complainant has "substantially prevailed." Plaintiff contends that an executive agency should not be able to deprive an FOIA plaintiff of an attorney's fee award by unilaterally releasing documents wrongfully withheld prior to litigation. In short, plaintiff argues that in the case sub judice, he gained access to the information wrongfully withheld by the CIA only after the pressure of litigation and, therefore, that he has "substantially prevailed" within the meaning of the statute. At least three circuits of the United States Court of Appeals have held that a judgment in favor of the FOIA requester is not an absolute prerequisite to an award of attorney's fees under section 552(a)(4)(E). These decisions were based on the rationale that Congress did not intend to allow the government to evade the FOIA attorney's fee provision through eleventh hour tenders of the requested

information after litigation of the request is already pending:

In enacting section 552(a)(4)(E) Congress sought to encourage the average person, who would ordinarily find the barriers of court costs and attorney fees insurmountable, to pursue legitimate FOIA actions. The effectiveness of this incentive would be greatly diminished if the complainant was forced to bear the costs whenever the government chose to release the requested information during the pendency of the action but prior to a judgment or a court order.

Cunao v. Rumsfeld, 553 F.2d 1360 at 1365 (D.C. Cir. 1977).

See also Vermont Low Income Advocacy Council Inc. v. Usery, 546 F.2d 509 (2d Cir. 1976); Campbell v. United States Civil Service Commission, 539 F.2d 58 (10th Cir. 1976). However, notwithstanding that the complainant herein may have "substantially prevailed," there are other factors which the court must consider in determining the appropriateness of an award of costs and attorney's fees. At a minimum, the FOIA plaintiff must show that "the prosecution of the action could reasonably have been regarded as necessary and that the action had substantial causative effect on the delivery of the information." Usery, supra, at 513. In addition, the legislative history of what was to become section 552(a)(4)(E) specified four criteria to be weighed by the court in exercising its discretion to award attorney's fees: "(1) the benefit to the public, if any, deriving from the case; (2) the commercial benefits to the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether the government's withholding of the records sought had a reasonable basis in law."

1 Vermont Low Income Advocacy Council Inc. v. Usery, 546 F.2d 509 at 512 (2d Cir. 1976). These four factors originate from the Senate version of what was to become section 552(a)(4)(E). Although the conference substitute eliminated these four factors, the conference report explicitly states that in so doing the conferees did not intend to make the award of attorney's fees automatic or to preclude the courts, in exercising their discretion in awarding such fees, from taking these factors into

In reviewing the record in the case sub judice, the court concludes that the complainant should not prevail in his motion for an award of attorney's fees. First, the affidavit of Mr. Gene F. Wilson, Privacy Coordinator of the Central Intelligence Agency, offered in support of defendants' motion for summary judgment, establishes that the documents requested by the complainant were released as a result of "a final determination of the merits of the complainant's FOIA appeal by the internal administrative processes of the defendant agency." Although the defendant failed to act promptly on plaintiff's administrative appeal of the partial denial of his initial FOIA request, no final action on the appeal had been taken by the defendant at the time this action was brought. Thus, there is substantial doubt on this record as to whether the release of the documents actually resulted from the pressure of litigation rather than from the routine disposition of an administrative appeal. Second, the complainant herein has failed to establish either the absence of potential private commercial benefit to the plaintiff from a disclosure of the documents in question or the presence of any public benefit from such disclosure. Finally, fatal to the complainant's prayer for an award of attorney's fees is his failure to act promptly following the defendant's release of additional documents or portions of documents on February 7 and February 14, 1977. The complainant's delay in communicating his position after the February releases necessitated considerable effort by defendants in the course of preparing their motion for summary judgment filed on July 14, 1977. Furthermore, the complainant herein again delayed these proceedings by failing to reply to the defendants' motion for summary judgment until September 27, 1977. Because the complainant has

needlessly prolonged this suit with disregard for the defendants and for the resulting added burden to the already heavy docket of the Northern District of Georgia, this court can see no reason for rewarding this complainant with monies from the public treasury. Accordingly, plaintiff's motion to alter or amend the judgment of September 30, 1977, is hereby denied.

IT IS SO ORDERED this th17 day of November, 1977.

Will C. O'Kelley
WILLIAM C. O'KELLEY
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTI-
GATION, et al.,

Defendants.

No. 76-89-S

CERTIFICATE OF SERVICE

BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

IT IS HEREBY CERTIFIED that:

I, Nancy Amans, am a citizen of the United States
over the age of eighteen years and a resident of San Diego County,
California; my business address is 940 Front Street, San Diego,
California; I am not a party to the above-entitled action; and
On December 12, 1977, I deposited in the United States
mail at San Diego, California, in the above-entitled action, in
an envelope bearing the requisite postage, a copy of _____

addressed to Richard C. Leonard, Esq., 433 North Camden
Drive, Suite 1200, Beverly Hills, CA 90210,
the last known address, at which place there is delivery service
of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is
true and correct.

Executed on this 12th day of December, 19 77.

Nancy Amans
Nancy Amans

62-116929-85

ENCLOSURE

① ② ③
Dockets
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Atty.

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JAN 27 1978

CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
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~~JPB~~
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,
Plaintiff
v.
FEDERAL BUREAU OF
INVESTIGATION, et al.,
Defendants.

Civil No. 76-89-S

MEMORANDUM OPINION

Plaintiff, JUDITH KATHERINE EXNER, has moved for an award of attorney fees and litigation costs pursuant to the provisions of the Freedom of Information Act, 5 U.S.C. § 552 (a)(4)(E). Plaintiff's action was brought under the Freedom of Information Act, 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a, demanding certain records pertaining to her in the possession of the Federal Bureau of Investigation (FBI). For the reasons discussed in this opinion, the court concludes that plaintiff has "substantially prevailed" in this litigation, and that she is entitled to an award of attorney fees and litigation costs.

28 JAN 29 1978
/ ENCLOSURE

FACTUAL BACKGROUND

On December 24, 1975, at the request of plaintiff, a letter was written to the FBI requesting access to any and all records relating to her contained in the files of the

b6
b7C

1 FBI. Plaintiff received no response to her request within ten
2 working days. Deeming this failure to respond a denial of her
3 request¹, plaintiff, by her attorney, wrote a letter to the
4 Department of Justice dated January 11, 1976. Plaintiff indi-
5 cated in this letter that she deemed her previous request denied
6 and appealed that denial directly to the Department of Justice.

7 By letter dated January 15, 1976, the Director
8 of the FBI responded to plaintiff's request for information.
9 After acknowledging receipt of plaintiff's Freedom of Information-
10 Privacy Acts request, the FBI letter indicated that, because of
11 the heavy backlog of requests for information, more time would
12 be necessary to process plaintiff's request.

13 During the next two weeks, plaintiff's attor-
14 ney attempted, by letter and telephone call, to convince the
15 FBI that plaintiff's request should be given priority handling.
16 Because of the unique circumstances of her case, plaintiff be-
17 lieved her request was entitled to expedited treatment and pro-
18 cessing by the government. In a letter dated February 5, 1976,
19 the Chief of the Freedom of Information and Privacy Unit in the
20 Office of the Attorney General denied plaintiff's request for
21 preferential treatment. Plaintiff was advised that she could
22 treat the February 5 letter as a denial of her administrative
23 appeal by the Deputy Attorney General, entitling her to seek
24 relief in the courts.

25
26 - - - - -
27 1 5 U.S.C. § 552(a)(6)(A) requires an agency, upon any request
28 for records made under the Freedom of Information Act, to de-
29 termine within ten working days after the receipt of such a
30 request whether to comply with it. The agency must immediately
31 notify the person making the request whether the agency will
32 comply. Under 5 U.S.C. § 552(a)(6)(C), the person is deemed
to have exhausted his administrative remedies with respect to
the request if the agency fails to comply with the ten day
limit. It was under the authority of this statutory scheme
that plaintiff deemed the FBI's failure to respond within ten
working days a denial of her request.

1 On February 6, 1976, plaintiff filed an action
2 in this court to compel immediate disclosure of records pertain-
3 ing to her in the possession of the FBI. Pursuant to orders of
4 this court entered April 9, 1976, and April 20, 1976, defendants
5 were ordered to make a report and to file an affidavit or affi-
6 davits containing the detailed information contemplated by Vaughn
7 v. Rosen, 484 F.2d 820 (D.C. Cir. 1973). The court also denied
8 the government's motion to stay further proceedings pending com-
9 pletion of defendants' review of the documents requested.

10 Immediately thereafter, the defendants appealed
11 this court's orders relating to the stay and to the requirement
12 that a Vaughn v. Rosen affidavit be filed. On May 26, 1976, the
13 Court of Appeals for the Ninth Circuit denied the government's
14 motion for a stay of this court's orders pending appeal. The
15 effect of the Ninth Circuit's denial was to force the government
16 to produce a Vaughn v. Rosen affidavit, and any documents which
17 were not in dispute, while the appeal was pending. The Ninth
18 Circuit issued its decision on the substantive merits of the
19 government's appeal on September 30, 1976. Concluding that this
20 court did not abuse its discretion in declining to grant the
21 defendants further time, the Court of Appeals held that "the
22 filing of suit by a person demanding information can (but does
23 not necessarily) move such petition 'up the line,' i.e., create
24 a preference, particularly if a Federal Court orders it." Exner
25 v. Federal Bureau of Investigation, 542 F.2d 1121, 1123 (9th
26 Cir. 1976).

27 In the wake of this court's April, 1976,
28 orders, and the Ninth Circuit's denial of a stay pending appeal,
29 the defendants on June 24, 1976, released to plaintiff approxi-
30 mately 200 pages from 85 documents. On four additional occa-
31 sions through and including August 10, 1977, more documents
32 were released. Of a total of ninety-two documents identified

1 by defendants in response to plaintiff's request, defendants
2 released to her eighty-six documents in whole or in part by
3 August 10, 1977. As to the documents and portions of documents
4 not released, the government asserted exemptions pursuant to the
5 Privacy Act and the Freedom of Information Act. After examining
6 these documents in camera, the court concluded that they were
7 properly withheld from disclosure. The government's motion for
8 summary judgment was granted and the action was dismissed.

9 PLAINTIFF'S MOTION FOR ATTORNEY FEES

10 Against this factual background, plaintiff has
11 moved for an award of attorney fees and litigation costs. As a
12 general rule of law, it is well established that attorney fees
13 are not ordinarily recoverable by the prevailing party in federal
14 litigation in the absence of statutory authorization. Alyeska
15 Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975).
16 Similarly, Congress has provided in 28 U.S.C. § 2412 that attor-
17 ney fees may not be assessed against the United States unless
18 they are specifically authorized by statute. In this case, the
19 authority for an award of fees and costs derives from 5 U.S.C.
20 § 552(a)(4)(E), which provides as follows:

21 "The court may assess against the
22 United States reasonable attorney
23 fees and other litigation costs
24 reasonably incurred in any case
under this section in which the
complainant has substantially pre-
vailed." [emphasis added]

25 The issue the court must resolve is whether the plaintiff has
26 "substantially prevailed" as that term is used in the above sta-
27 tutory provision.

28 Policy and legislative history of § 552(a)(4)(E)

29 To resolve this issue, some attention must be
30 given to the underlying policy and legislative history of § 552
31 (a)(4)(E). The Freedom of Information Act was enacted to insure
32 that an unnecessary web of secrecy would not be drawn around

1 information which the public is entitled to know. As the Court
2 of Appeals for the District of Columbia Circuit recently noted,
3 FOIA's basic policy is "to encourage the maximum public access
4 to government information." Nationwide Building Maintenance,
5 Inc. v. Sampson, 559 F.2d 704, 715 (D.C. Cir. 1977). The attor-
6 ney fees provision of the statute has as its fundamental purpose
7 the facilitation of citizen access to the courts to vindicate
8 the public's statutory rights. This court finds itself per-
9 suaded by the view of the D. C. Circuit that "a grudging appli-
10 cation" of the attorney fees provision "would be clearly contrary
11 to congressional intent." Id.

12 This court also is cognizant of the fact that
13 without some provision for attorney fees, many citizens and or-
14 ganizations would be unable to prosecute actions under
15 the Freedom of Information Act. As a practical matter, costs
16 and fees present a virtually insurmountable barrier which bars
17 the average person from forcing governmental compliance with the
18 law. See S. Rep. No. 93-854, 93d Cong., 2d Sess. 17 (1974);
19 Cuneo v. Rumsfeld, 553 F.2d 1360, 1363-64 (D.C. Cir. 1977).
20 Congress realized that an allowance of fees and costs was neces-
21 sary in FOIA actions to encourage full public disclosure of
22 government information. S. Rep. No. 93-854, supra, at 18. In
23 § 552(a)(4)(E), Congress has made a clear determination that an
24 award of attorney fees is appropriate and desirable whenever a
25 complainant prevails in FOIA litigation. Id.; Cuneo v. Rumsfeld,
26 supra, 553 F.2d at 1364.

27 Legislative history provides additional insight
28 into the purpose and function of the Freedom of Information Act's
29 proviso for attorney fees. As originally proposed by the House
30 of Representatives, the provision which was to become § 552(a)
31 (4)(E) permitted recovery of attorney fees and litigation costs
32 in any FOIA case in which the United States "has not prevailed"

1 H.R. 12471, 93d Cong., 2d Sess. (1974). The Senate's somewhat
2 different version proposed an award of attorney fees in any case
3 where the complainant "substantially prevailed." S. 2543, 93d
4 Cong., 2d Sess. (1974). The Senate bill outlined four criteria
5 to be considered by the court in exercising its discretion to
6 award attorney fees: (1) the benefit to the public, if any,
7 deriving from the case; (2) the commercial benefit to the com-
8 plainant; (3) the nature of the complainant's interest in the
9 records sought; and (4) whether the government's withholding of
10 the records sought had a reasonable basis in law. The Senate
11 report accompanying the bill included the following explanation

12 "Generally, if a complainant has
13 been successful in proving that
14 a government official has wrong-
15 fully withheld information, he
16 has acted as a private attorney
17 general in vindicating an impor-
18 tant public policy. In such cases
19 it would seem tantamount to a pen-
20 alty to require the wronged citizen
21 to pay his attorneys' fees to make
22 the government comply with the law."

18 S. Rep. No. 93-854, supra, at 19.

19 The compromise bill which emerged from confer-
20 ence retained the "substantially prevailed" language of the
21 Senate bill but eliminated the four criteria set forth above.
22 Although the conferees did not wish to preclude the courts from
23 taking such criteria into consideration, they believed the
24 courts should not be limited to these criteria in exercising
25 their discretion. H. Rep. No. 93-1380, 93d Cong., 2d Sess. 9
26 (1974). Consequently, the court may take into account whatever
27 factors it deems relevant in determining whether an award of
28 attorney fees is appropriate.

29 Analysis of legal issues

30 This particular case presents the court with
31 a factual situation which, to the court's knowledge, has not
32 been faced by any other federal court. Unlike so many of the

1 reported decisions construing § 552(a)(4)(E), this is not a case
2 where the government voluntarily turned over everything the
3 plaintiff sought after the lawsuit was initiated but before a
4 final judgment. See, e.g., Vermont Low Income Advocacy Council
5 Inc. v. Usery, 546 F.2d 509 (2d Cir. 1976); Cuneo v. Rumsfeld,
6 supra; Goldstein v. Levi, 415 F. Supp. 303 (D.D.C. 1976). Nei-
7 ther side in this case was 100% successful or unsuccessful. Al-
8 though the limited number of previous decisions construing § 552
9 (a)(4)(E) provide some general guidance, the court deals here
10 with a matter governed primarily by judicial discretion. Because
11 of the unusual nature of this case, the court has reviewed
12 plaintiff's request for attorney fees with a great deal of care
13 and consideration.

14 In determining whether a plaintiff has substan-
15 tially prevailed in FOIA litigation, the court requires two
16 threshold conditions to be satisfied. First, the plaintiff must
17 show that prosecution of the action could reasonably have been
18 regarded as necessary. Second, the action must be shown to have
19 had substantial causative effect on the delivery of the informa-
20 tion. Vermont Low Income Advocacy Council, Inc. v. Usery, supra,
21 546 F.2d at 513. Both conditions have been fulfilled here.

22 With regard to the first condition, plaintiff
23 had a compelling need to bring this lawsuit. She was not simply
24 an ordinary citizen who was curious as to what information the
25 government might have compiled on her. During her 1975 testimony
26 before a U. S. Senate select committee on intelligence activi-
27 ties, she became aware that the FBI had conducted investigations
28 and maintained files relating to her since 1960. She believed
29 that information pertaining to her published by the Senate com-
30 mittee in its official report was inaccurate. Although she her-
31 self was enjoined to secrecy by the Senate committee, and had
32 maintained strict personal silence as to the subject matter for

1 many years, it soon appeared that information emanating from her
2 FBI files, some of it inaccurate, had been leaked to the press
3 by the Senate select committee staff. Perhaps most important,
4 she felt the leaked information regarding her alleged relation-
5 ships with organized crime figures, two of whom had been mur-
6 dered, exposed her to grave personal danger. Because of all
7 these concerns, it was incumbent that plaintiff have an oppor-
8 tunity not only to review and correct the information in the
9 FBI's files, but to do so as soon as possible. Given the govern-
10 ment's unwillingness to give her request any sort of preferential
11 treatment, the only way plaintiff could accomplish her goal was
12 to bring this action.

13 As far as causative effect is concerned, the
14 court has no doubt that this action was directly responsible for
15 delivery of the documents plaintiff received. The government
16 contends that plaintiff's suit did not facilitate the production
17 of any information that she otherwise would not have received in
18 due time. This may or may not be true; there is no proof as to
19 what, if any, information eventually would have been produced in
20 the absence of this action. Even assuming the government's con-
21 tention is correct, the purpose of the lawsuit was to compel im-
22 mediate production of documents in the government's possession.
23 The government seems to suggest in its argument that an action
24 affecting only the timing of production does not meet the test
25 for an award of attorney fees. Section 552(a)(4)(E) contains
26 no such limitation, nor does the legislative history suggest
27 Congress desired one. The key is whether there is a substantial
28 causative relationship between the lawsuit and the delivery of
29 information. When the information is delivered may be as impor-
30 tant as what information is delivered.

31 The court's conclusion that this action sub-
32 stantially caused the delivery of information is further

1 supported by the fact that this litigation was tedious and hard
2 fought at every stage. Throughout the proceedings, the govern-
3 ment presented a very formidable opposition. Virtually every-
4 thing plaintiff attempted to do was vigorously opposed. Were
5 it not for the dogged determination of plaintiff and her attor-
6 ney, it is unlikely the case would ever have produced the favor-
7 able results it achieved.

8 There are other factors which lead the court
9 to conclude that plaintiff substantially prevailed in this case.
10 Plaintiff convinced this court and the Ninth Circuit Court of
11 Appeals that she was entitled to have her request for information
12 moved "up the line". In so doing, she established the principle
13 that there are some exceptional cases where the government must
14 specially process requests for information on a priority basis.
15 In effect, plaintiff acted as a private attorney general in vin-
16 dicating an important public policy. This is precisely the type
17 of situation Congress indicated would be proper for an award of
18 attorney fees. S. Rep. No. 93-854, supra, at 19.

19 In addition, the court has evaluated the na-
20 ture of plaintiff's interest in the records she sought. Plain-
21 tiff had a legitimate personal interest in the documents in-
22 volved in this case. There was evidence that (1) the FBI had
23 compiled a substantial amount of information pertaining to
24 plaintiff; (2) at least some of the information may have been
25 inaccurate; (3) the information was being made a matter of pub-
26 lic record without plaintiff's being given an opportunity to re-
27 view it beforehand; and (4) plaintiff's personal safety might be
28 endangered. Throughout the case, the government has urged that
29 plaintiff wanted the information primarily for use in connection
30 with a book she was preparing. While this may have been one
31 reason for pursuing the action, the court believes plaintiff's
32 primary motivation was personal rather than commercial. The

1 matter is somewhat academic because plaintiff's book was pub-
2 lished prior to the release of any documents in this litigation.

3 Finally, the court is impressed by the sum to-
4 tal of what plaintiff accomplished in this litigation. It is
5 true that plaintiff was not completely successful. The statute,
6 however, does not require complete success. It requires only
7 that the complainant substantially prevail. Plaintiff here was
8 significantly more successful than the government. Although she
9 did not receive all the documents she sought, she did get a very
10 substantial portion of what she requested. More important, she
11 completely succeeded in her effort to force the government to
12 give her information request priority treatment. On balance,
13 the court considers plaintiff to have substantially prevailed in
14 this litigation. Therefore, she is entitled to an award of at-
15 torney fees and litigation costs.

16 Amount of award

17 It remains for the court to determine the
18 amount of attorney fees to be awarded. The following criteria
19 should be considered in determining the award: time spent by
20 attorney; novelty and complexity of the issues presented; level
21 of skill required; customary fee charged by attorney or firm;
22 experience, reputation, and ability of attorney; and awards in
23 similar cases. Goldstein v. Levi, supra, 415 F. Supp. at 305-06.

24 Plaintiff's counsel has submitted an affidavit
25 detailing the services rendered in this case, time spent, and
26 his general background and experience. Counsel states in his
27 affidavit that he has spent approximately one hundred fifty hours
28 in connection with this litigation, including six appearances
29 before this court, argument before the Ninth Circuit Court of
30 Appeals, and preparation of appellate court briefs and numerous
31 motions and pleadings. Counsel indicates that he has a substan-
32 tial amount of experience in commercial litigation matters, more

1 than fifty percent of which has been in federal court. The cus-
2 tomary hourly rate charged by counsel is stated to range from
3 \$75 to \$85 per hour. In this matter, counsel has billed plain-
4 tiff at the rate of \$75 per hour, which this court finds to be
5 a reasonable hourly compensation for plaintiff's attorney herein.

6 As the court indicated previously, this liti-
7 gation was tedious and hard fought at every stage. Many of the
8 issues were complex, particularly those concerning the plaintiff's
9 right to have her document request accorded priority considera-
10 tion. The action, which was actively litigated before this
11 court for a period of nineteen months, was fairly lengthy. Fi-
12 nally, the quality of counsel's work throughout the case was
13 consistently excellent.

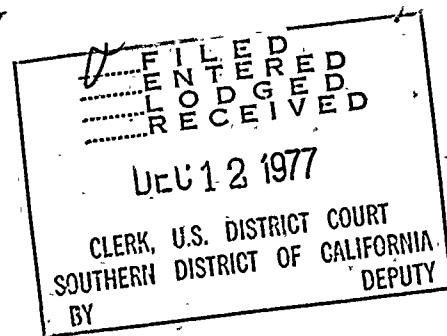
14 Counsel for plaintiff indicated on the record
15 that of the total of one hundred fifty hours expended by him in
16 this matter, approximately twenty-five hours were devoted to
17 resisting defendants' motion for summary judgment which was
18 granted by the court. It is the finding of the court that by
19 the time the motion for summary judgment was filed, plaintiff
20 had received all the questioned materials to which she was en-
21 titled and that plaintiff's unsuccessful resistance of the motion
22 produced no substantial benefit for plaintiff. Accordingly, in
23 its allowance of fees the court will take into account only one
24 hundred twenty-five hours of attorney time, and will order an
25 award of \$9,375.00 as and for plaintiff's attorney fees herein.

26 Counsel for plaintiff also has submitted an
27 itemized list of costs and expenses. 5 U.S.C. § 552(a)(4)(E)
28 permits an award of litigation costs in addition to attorney
29 fees. The costs incurred by plaintiff are reasonable, and the
30 court will order an award of \$700.21 for expenses and costs.

31 DATED: January 26, 1978

32 
EDWARD J. SCHWARTZ, Chief Judge
United States District Court

Copies to all parties



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Telephone: (714) 293-5662

Attorneys for Defendants

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,
Plaintiff,
v.
FEDERAL BUREAU OF INVESTI-
GATION, et al.,
Defendants.

Civil No. 76-89-S

RESISTANCE TO
APPLICATION FOR
ATTORNEY FEES

1. The Freedom of Information Act [FOIA] authorizes recovery of attorney fees by a party who has "substantially prevailed" in the litigation. 5 U.S.C. §552(a)(4)(E).

2. Although entry of judgment in one's favor is not a condition precedent to finding that one has "substantially prevailed," recovery of attorney fees is contingent upon some causal link between filing an FOIA suit and production of the documents. See, Vermont Low Income Advocacy Council, Inc. v. Usery, 546 F.2d 509 (2d Cir. 1976).

3. Legislative history makes it clear that the Congress contemplated that the government would need to have withheld information before one could be said to have substantially prevailed, and hence be entitled to attorney fees. See generally, Cuneo v. Rumsfeld, 553 F.2d 1360, 1363-66 (D.C. Cir. 1977);

ENCLOSURE

56 JAN 3 1978

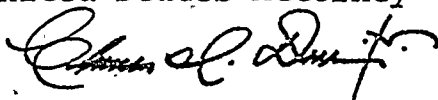
1 FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974, 94th CONG., 1st
2 SESS., at 171, 202, 243-43 (Joint Comm. Print, March 1975).

3 4. There is nothing in the record of this case to suggest
4 that the plaintiff's suit brought about production of any
5 information that she otherwise would not have received. While
6 filing suit may have affected the timing of production; there is
7 no basis to conclude that the plaintiff has acted as a private
8 attorney general and compelled production of information which
9 wrongfully was being withheld. Indeed, once the administrative
10 machinery processed her requests, information was produced; and
11 this court affirmed the government's position with respect to
12 the only information that ever was withheld.

13 5. To argue that the plaintiff has substantially prevailed
14 in compelling production of information wrongfully withheld, is
15 to contend post hoc, ergo propter hoc. This court should reject
16 such a suggestion and disallow recovery of attorney fees. See,
17 Cameron v. Central Intelligence Agency, Civil No. C76-1741A (N.D.
18 Ga., filed November 17, 1977) [attached as Exhibit "A"].

19 DATED: December 12, 1977

20 TERRY J. KNOEPP
21 United States Attorney

22 
23 CHARLES H. DICK, JR.
24 Assistant U. S. Attorney
25
26
27
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32



UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

February 14, 1979

Address Reply to the

Division Indicated

and Refer to Initials and Number

LMCole:wm

145-12-2683

FEDERAL GOVERNMENT

TELEPHONE:

(202) 633-3525

John Hall, Esquire
Legal Division
Federal Bureau of Investigation
Washington, D. C. 20535

Re: Judith Katherine Exner v. Federal Bureau of
Investigation (C.A. 9, No. 78-1152 and
78-1880)

Dear Mr. Hall:

This letter will confirm our telephone conversation of
February 13, 1979. At that time, I informed you of the
statements which the presiding judge made at oral argument
in the above-captioned cases. The judge's statements are
also summarized in the enclosed memorandum to the files
which I wrote on the day after the argument.

As you know, 95% of the documents at stake in the
Exner case were drawn from the Bureau's files on John Roselli.
In view of the judge's statement that he was once Roselli's
lawyer and in view of his statement that he too may appear
in the Roselli files, we asked you to send us a recommendation
concerning a possible motion to disqualify. Given the extreme
sensitivity of asking a federal judge to step down, we would
request that any recommendation in favor of filing such a
motion be signed by Director Webster.

Very truly yours,

Linda M. Cole
Attorney, Appellate Staff
Civil Division

Enclosure

ENCLOSURE

20 FEB 22 1979



70 MAR 2 1979

UNITED STATES GOVERNMENT

Memorandum

TO : MEMORANDUM TO THE FILE

DATE: February 13, 1979
LMCole:wm

FROM : Linda M. Cole
Attorney, Appellate Staff
Civil Division

SUBJECT: Judith Katherine Exner v. Federal Bureau of
Investigation, et al. (C.A. 9, No. 78-1152
and No. 78-1880)

On Monday, February 12, 1979, I presented oral argument in the above-captioned cases. The appeal in No. 78-1152 concerns the scope of the F.B.I.'s exemption from the Privacy Act. The underlying facts concern Judith Exner's attempt to obtain information from the F.B.I.'s organized crime files. As noted at p. 5 of our main brief, over 95% of the documents in dispute were drawn from files compiled during the anti-racketeering investigation of John Roselli.

At oral argument, the presiding judge (Walter Ely) stated that, prior to his elevation to the bench, he had been John Roselli's lawyer. Judge Ely further noted that his name probably appears in the Roselli files too. The judge made these comments during a discussion of the extent to which the F.B.I. could exclude persons who are named in the organized crime files from access to those files under the Privacy Act.

The judge also directed government counsel to send the Court a letter stating the whereabouts of the in camera exhibit so that the Court would have the option of studying the materials in question. The exhibit consists primarily of material from the Roselli files which was submitted to the District Court in connection with Mrs. Exner's FOIA claims. Neither party designated the exhibit for inclusion in the record on appeal.



5010-110

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

ENCLOSURE.

62-116929-36X

197-900-1



UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

BAB:IJ:LMCole:eac
145-12-2683

31 MAY 1978

MEMORANDUM FOR THE SOLICITOR GENERAL

Re: Exner v. F.B.I. (U.S.D.C.;
S.D. Cal., No. 76-89-S)

JUDITH

TIME LIMITS

Judith Katherine Eileen Exner

A protective notice of appeal from the District Court's order awarding Exner attorneys fees was filed on March 24, 1978. Exner subsequently moved to consolidate the government's appeal with her own appeal from the District Court's order holding certain records exempt from disclosure under the Freedom of Information Act. The Ninth Circuit granted the motion with the result that our opening brief on the attorneys fees issue is now due on June 26, 1978.

RECOMMENDATIONS DE-62
REC-114 V-6

The F.B.I. orally recommends appeal.

I recommend appeal.

QUESTION PRESENTED

Whether a plaintiff who obtained expedited handling of her FOIA request has "substantially prevailed" on the merits within the meaning of 5 U.S.C. § 552(a)(4)(E) so as to be entitled to an award of attorneys' fees and costs against the United States.

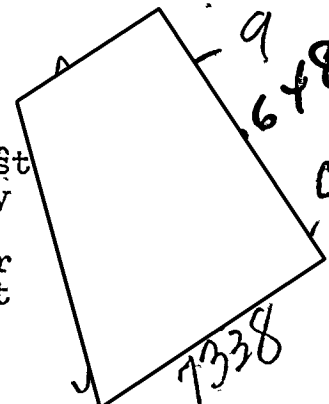
STATUTES INVOLVED

5 U.S.C. § 552(a)(4)(E) provides:

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

24 AUG 28 1978

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B/03

5 U.S.C. (a)(6)(A) provides:

Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall --

(1) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

5 U.S.C. 552(a)(6)(C) pertinently provides:

Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. * * *.

STATEMENT

On Christmas Eve, 1975, Judith Exner submitted an FOIA request to the FBI seeking access to any Bureau records concerning her. On January 11, 1976, barely ten working days later, Exner informed the Deputy Attorney General (1) that the FBI had not responded to her request within the time limits imposed by the Act, (2) that she therefore deemed her request to have been denied, (3) that he should construe her letter as a formal appeal and (4) that he must act upon her appeal within twenty working days. Exner relied upon 5 U.S.C. § 552(a)(6)(A) and (C).

On January 15, 1976, the FBI acknowledged Exner's request and explained that it could not fairly act upon her application until it had processed earlier requests from other people. Exner promptly sought priority treatment, alleging that she was afraid for her personal safety and that her records would be of historical interest. On February 5, 1976, the Deputy Attorney General refused to prefer her over the thousands of prior applicants and, on February 6, 1976, Exner sued to compel immediate disclosure.

In district court, the government argued that the FBI was entitled to additional time under 5 U.S.C. § 552(a)(6)(C) because the unexpected volume of FOIA requests which had flooded the agency constituted "exceptional circumstances" and because the agency was "exercising due diligence" in processing the requests in chronological order. The government further argued that the FOIA does not provide any basis for preferring some claims over others and that it would be unfair to process later applications before earlier ones. Although these arguments subsequently persuaded the U.S. Court of Appeals for the D.C. Circuit, See Open American v. Watergate Special Prosecution Force, 547 F. 2d 605 (1976), they did not convince the District Court. It ordered immediate production of all non-exempt material.

The government promptly sought but failed to obtain, a stay pending appeal. It therefore had to expedite its handling of Exner's request before it could present its arguments against expedition to the Ninth Circuit. By the time the case was ultimately heard, the bulk of Exner's request had already been granted.

On appeal, the Ninth Circuit agreed that the FBI receives so many FOIA requests that it literally cannot comply with the strict time limits of 5 U.S.C. § 552(a)(6)(A) and that, under the circumstances, the practice of processing all requests seriatim is generally fair and reasonable. However, the Court held that 5 U.S.C. § 552(a)(6)(C) gives the district judge broad discretion in deciding whether to allow an agency additional time to process a given request and that the government had failed to show that the judge had abused his discretion in refusing to grant additional time in this case. Exner v. F.B.I., 542 F. 2d 1121 (9th Cir. 1976). Both Exner and the government thereupon requested the Court of Appeals to award costs and attorneys fees, but the Court refused, holding that "no party has as yet prevailed." Order dated November 15, 1976.

On remand, the district court examined each disputed document in camera. Finding that the FBI had made "the maximum reasonable disclosures to plaintiff," the court upheld all of the government's claimed exemptions. Order dated October 18, 1977. Nevertheless, the court awarded Exner \$10,075.21 in costs and attorney's fees. Order dated January 27, 1978. The court based its decision primarily upon Exner's success in forcing the government to give her preferential treatment and secondarily upon the government's failure to prove that Exner's lawsuit did not compel any disclosures which would not have been made had she simply waited her turn. Opinion dated January 27, 1978, pp. 8-9.

Exner has appealed from the Order sustaining the government's claims of exemption and the Ninth Circuit has consolidated her appeal on the exemption issue with the government's appeal on the attorney's fees issue.

DISCUSSION

- I. The District Court's reasoning is erroneous in light of the legislative history of 5 U.S.C. § 552(a)(4)(E).

In construing the attorney's fees provision of the FOIA, the Courts of Appeals have uniformly begun by analyzing its legislative history. See, e.g., Blue v. Bureau of Prisons, 570 F. 2d 529 (5th Cir. 1978); Nationwide Building Maintenance, Inc. v. Sampson, 559 F. 2d 704 (D.C. Cir. 1977); Vermont Low Income Advisory Council v. Usury, 546 F. 2d 509 (2d Cir. 1976). This

legislative history makes it clear that an award of attorney's fees should not be automatic and that, in deciding whether to make an award, the District Court should give special consideration to the four factors enumerated in the original Senate bill. Freedom of Information Act and Amendments of 1974 (94th Cong., 1st Sess., March 1975), pp. 226-27. Those factors are (1) the benefit to the public deriving from the case (2) the commercial benefit to the complainant (3) the nature of the complainant's interest in the records sought and (4) whether the government's withholding of the records sought had a reasonable basis in law. *Id.* A fair application of these four criteria to the instant case establishes that the award of attorney's fees was inappropriate.

1. The public benefit.

In obtaining preferential treatment for herself, Exner did not contribute to the total flow of information into the public domain. She simply forced the FBI to expend resources for her personal benefit which would otherwise have been used to process earlier FOIA requests. Open American v. Watergate Special Prosecution Force, 547 F. 2d 605, 614 (D.C. Cir. 1976). Thus, in assessing the public benefit from Exner's suit, it is important to note its displacement effect. Exner did succeed in hastening the production of the information she desired. However, she did so by delaying the production of other, perhaps more valuable, information to other requesters.

2. Commercial benefit and the nature of the complainant's interest.

The legislative history of 5 U.S.C. § 552(a)(4)(E) makes it clear that the Senate instructed the federal courts to inquire into the commercial ramifications of an FOIA request and into the nature of the complainant's interest in the records sought because it did not want to subsidize FOIA litigants who would have filed suit anyway. S. Rep. No. 93-854, 93d Cong., 2d Sess., p. 19 (1974). See also Blue v. Bureau of Prisons, 570 F. 2d 529 (5th Cir. 1978); Nationwide Building Maintenance, Inc. v. Sampson, 559 F. 2d 704, 712-13 (D.C. Cir. 1977). FOIA plaintiffs who feel a compelling need to obtain their

records on a preferential basis do not require the incentive of 5 U.S.C. § 552(a)(4)(E) to bring suit. By definition, they have a "private self-interest motive . . . sufficient to insure the vindication of the rights given in the FOIA." S. Rep. No. 93-854, at 19.

3. The legal basis for the government's conduct.

Although the government's reasons for treating all FOIA requests in chronological order were rejected by the District Court, they were subsequently accepted by the U.S. Court of Appeals for the District of Columbia Circuit. Open American v. Watergate Special Prosecution Force, 547 F. 2d 605 (D.C. Cir. 1976). The fact that the government's arguments were of sufficient weight to convince a federal appellate court should be more than enough to establish that it had a reasonable basis in law for refusing to expedite Exner's request.

In addition, the government's conduct in the instant case must be viewed against a backdrop of precedents holding that all FOIA requests are to be treated equally regardless of the intensity of the requester's interest in the documents in question. See, e.g., NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n. 10 (1975). The government made no effort to withhold disclosable information from Exner. It simply insisted upon treating her request just like any other. Prior cases such as Sears indicated that this was the appropriate course of action.

II. The District Court's reasoning in light of the prior decisions construing 5 U.S.C. § 552(a)(4)(E).

In the first Court of Appeals decision construing 5 U.S.C. § 552(a)(4)(E), the Second Circuit concluded that "a plaintiff must show at a minimum that the prosecution of the action could reasonably have been regarded as necessary and that the action had a substantial causative effect on the delivery of the information." Vermont Low Income Advisory Council v. Usery, 546 F. 2d 509, 513 (1976) (Friendly, J.). In the instant case, the government argued that Exner had not shown the requisite causal link because she would have received the same information

simply by waiting her turn.

The District Court dismissed the contention on the grounds that "there is no proof as to what, if any, information eventually would have been produced in the absence of this action." Opinion dated January 27, 1978, p. 8. In so doing, it inverted the burden of proof set by the Second Circuit. Instead of requiring the plaintiff to show necessity or causation, the District Court required the government to show a lack thereof. This line of reasoning is clearly erroneous.

The District Court also opined that Exner had established causation because she had achieved immediate production. In the eyes of the District Court, "When the information is delivered may be as important as what information is delivered." Opinion dated January 27, 1978, p. 8. (Emphasis in original.) This line of reasoning also conflicts with applicable precedents in the Courts of Appeals. The Second Circuit has denied attorney's fees to a plaintiff who attempted to use the time limits of 5 U.S.C. § 552(a)(6)(A) to "make a federal case out of a matter that . . . had promise of amicable resolution" Vermont Low Income Advisory Council, 546 F. 2d at 514-15. Similarly, the D.C. Circuit has observed that the FOIA's time limits "are intended to prevent the government from utilizing administrative delay to shield FOIA disputes from judicial review. They should not be read as a congressional imprimatur, conclusively establishing the necessity of court action when an agency does not comply -- particularly where the administrative delay arises from an agency's attempt to comply fully with the spirit of the FOIA . . ." Nationwide Building Maintenance, Inc. v. Sampson, 559 F. 2d 704, 715 (1977) (emphasis added). In the instant case, the FBI was attempting to comply with the spirit of the Act. It was attempting to treat all FOIA requesters equally, NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 143 n. 10 (1977), under circumstances which precluded satisfying the § 552(a)(6)(A) time limits. Exner v. FBI, 542 F. 2d 1121, 1122 (9th Cir. 1976); Open American v. Watergate Special Prosecution Force, 547 F. 2d 605 (D.C. Cir. 1976).

III. The District Court's reasoning is questionable in light of the record.

The District Court's primary reason for awarding attorney's fees was that Exner had successfully forced the government to give her preferential treatment and had

established the legal principle that there are exceptional cases in which the government must give priority to some FOIA requests at the expense of others. Opinion dated January 27, 1978, pp. 7-8. However, Exner had accomplished the former on May 26, 1976 when the Ninth Circuit denied the government's motion for a stay pending appeal and the FBI began processing her request out of sequence. She accomplished the latter on September 30, 1976 when the Ninth Circuit refused to hold that the District Court had abused its discretion in requiring that her request be given priority. Both of these accomplishments were thus before the Ninth Circuit when, on November 15, 1976, it declined to award attorney's fees on the express grounds that "no party has as yet prevailed." Nothing in the record on remand would justify the District Court in reaching the opposite conclusion.

CONCLUSION

For the foregoing reasons, I recommend appeal.

BARBARA ALLEN BABCOCK
Assistant Attorney General
Civil Division

By:

Irving Jaffe
Deputy Assistant Attorney General

FEDERAL BUREAU OF INVESTIGATION
FOI/PA
DELETED PAGE INFORMATION SHEET
FOI/PA# 1349828-0

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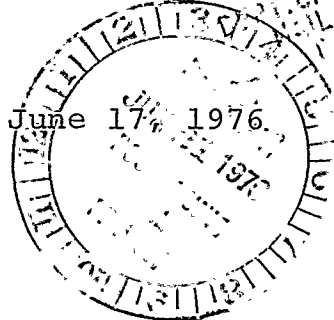
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RICHARD C. LEONARD
ATTORNEY AT LAW

JUN 19 8 50 AM '76

403 NORTH CAMDEN DRIVE, SUITE 1200
BEVERLY HILLS, CALIFORNIA 90210
(213) 278-9750



Lynne K. Zusman, Esq.
Department of Justice
Washington, D. C. 20530

Re: Judith Katherine Exner v. Federal Bureau of Investigation,
et al., USDC NO. 76-89-S

Dear Ms. Zusman:

As I explained to you in our telephone conversation of Tuesday, June 15, 1976, I am extremely concerned and agitated by certain actions taken by you and the Government in connection with the above-referenced action. Although it is impossible for you to rectify certain actions you already have taken, the purpose of this letter is to clarify my position, confirm our understanding of June 15, 1976, and attempt to set ground rules for further proceedings.

The April 9, 1976, Order of the District Court required the Government to turn over certain materials to plaintiff and to describe other materials which were not being turned over. Paragraph 2.4 of the Order expressly provides in pertinent part, that:

"The description should not be so detailed so as to contain information which compromises the secret nature of the documents, and, in this regard, excessive reference to the actual language of the documents should be avoided."

In addition to the provisions of paragraph 2.4, paragraph 4 of the Order further provides:

"Until both the plaintiff and the Court have had an opportunity to review any documents disclosed to the plaintiff by the defendants, or any of them, the defendants shall not disclose to any other person or entity the contents of any of said documents, except for 'routine use' as defined in 5 U.S.C. §552a(a)(7) and 5 U.S.C. §552a(b)."

56 OCT 13 1976

FED. BU. OF INV.

Lynne K. Zusman, Esq.
June 17, 1976
Page Two

The Report to the Court filed by you on or about June 10, 1976, violates the above cited provisions of the April 9, 1976, Order in that you attached to the Report as Exhibit "B" "samples" of the documents being disclosed to the plaintiff. Not only was such disclosure in violation of the Court's Order and in direct contravention of the provisions of the Privacy Act (upon which this litigation is, in part, grounded), but also, the disclosure of the documents constitutes unnecessary, intentional, and malicious invasion of my client's privacy. Not only did you disclose a "sample" of the documents which were to remain private, but also, it appears that you selected documents for the sole purpose of embarrassing Mrs. Exner and holding her up to public scorn and ridicule. By excising certain names and references, the documents you attached to the Report to the Court are subject to interpretation which would cast aspersions on Mrs. Exner's character.

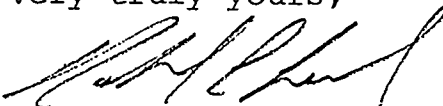
Since the damage already has been done in connection with the documents attached to the Report, you have left me with no other remedy but to initiate civil contempt proceedings against the defendants and against the attorneys whose names appear on the offending documents. Although five names appear on the document (Rex E. Lee, Terry J. Knoepp, John R. Neece, Jeffrey Axelred, and Lynne K. Zusman), if you will inform me which attorney is the responsible person, I will drop my charges against the other attorneys named. So that they will be advised of my intention to proceed with contempt proceedings, and so that they will understand my motivation therefor and my indignation, I am sending copies of this letter to the other attorneys listed on the pleading filed by the Government, as well as to Richard Lavine, Chief of the Civil Division.

In order to avoid any further problems, in our telephone conversation of June 15, 1976, you agreed not to make any further documents pertaining to Mrs. Exner public pending a ruling by Judge Schwartz. Additionally, I am awaiting a response from you as to your intentions with respect to the remaining documents which the Government is required to turn over to Mrs. Exner. I have not yet received those documents, and the time for production has passed. My oral demand of June 15, 1976, is reiterated. Failure to produce those documents for Mrs. Exner's inspection will be deemed a further contempt and will require me to proceed accordingly. Of course, the

Lynne K. Zusman, Esq.
June 17, 1976
Page Three

disclosure of the required documents must be made in private so as not to occasion a further contempt and violation of the Court's Order of April 9, 1976.

Very truly yours,



RICHARD C. LEONARD

RCL:pgs

cc: Rex E. Lee, Esq.
Terry J. Knoepp, Esq.
John R. Neece, Esq.
Jeffrey Axelred, Esq.
Richard Lavine, Esq.

June 24, 1976

REGISTERED

1 - Legal Counsel

Attn:

b6
b7C

Richard C. Leonard, Esq.
Suite 1200
433 North Camden Drive
Beverly Hills, California 90210

Dear Mr. Leonard:

Reference is made to the Freedom of Information-Privacy Acts request of your client, Judith Katherine Exner, dated December 24, 1975, and the current litigation, Exner v. FBI, et al., before the United States District Court, Southern District of California, Civil Action No. 76-89-SA.

Enclosed are two hundred pages from eighty-five documents which your client is entitled to receive pursuant to her request. For specific and detailed description of the exempted materials and applicable provisions of the statute, see the affidavit of Special Agent filed in CA No. 76-89-SA, June 10, 1976, with the "Report To The Court", by Assistant United States Attorney, John R. Neece. Please note that the affidavit states that portions of eighty-three documents out of a total of ninety-two were deemed releasable. In fact portions of eighty-five are being released. The discrepancy is due to a miscount at the time the affidavit was prepared.

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ENCLOSURE
Your client's request for records concerning herself is categorized as a Privacy Act request for purposes of determining fees. The applicable regulations specify a charge of ten cents per page and no charge for search efforts. Please remit a check or money order payable to the Federal Bureau of Investigation in the amount of \$20 to cover the duplication costs of the enclosed release.

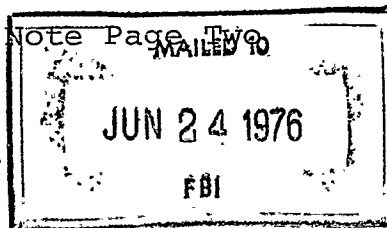
22 OCT 5 1976

1 - Assistant Attorney General for Administration
Attention: FOIPA Administrative Unit (Room 1134)

MLH:jal (6)

716855

Note Page Two



TELETYPE UNIT ☐

FBI/DOJ

Richard C. Leonard, Esq.

You have thirty days from receipt of this letter to appeal to the Attorney General from any denial contained herein. Appeals should be directed in writing to the Attorney General (Attention: Freedom of Information Appeals Unit), Washington, D. C. 20530. The envelope and the letter should be clearly marked "Freedom of Information Appeal" or "Information Appeal."

Sincerely yours,

Clarence M. Kelley
Director

Enclosures (85)

Note: Due to the litigation which ensued prior to disclosure pursuant to normal FOIPA processing, the FBI was compelled by court order to make known its disclosure decision by affidavit. Therefore no exemptions are cited in this letter and no changes should be directed pertaining to the enclosed documents unless the official doing so is prepared to authorize the filing of an additional affidavit before the court, amending the Government's prior position, e.g., as stated in 6/10/76, affidavit. Requester is receiving 200 pages from 85 documents out of a total of 396 pages (not counting "same information" in other documents) from 92 documents. Exemptions cited were Title 5, United States Code, Section 552 (b)(2), (b)(5), 7 (C), (D) and (F). In view of the court order regarding this matter, the FBI is billing, rather than collecting in advance for the duplication costs.

UNITED STATES GOVERNMENT

Memorandum

TO : Assistant Director
Records Management Division

DATE: 10/29/76

FROM : Legal Counsel *JAM*

SUBJECT: JUDITH KATHERINE EXNER v.
FEDERAL BUREAU OF INVESTIGATION, et al.
(U.S.D.C., S. D. OF CALIFORNIA)
CIVIL ACTION NO. 76-89-SA

Assoc. Dir. _____
Dep. AD Adm. _____
Dep. AD Inv. _____
Asst. Dir.: ☒
Adm. Serv. _____
Ext. Affairs _____
Fin. & Pers. _____
Gen. Inv. _____
Ident. _____
Inspection _____
Intell. _____
Laboratory _____
Legal Coun. _____
Plan. & Eval. _____
Rec. Mgnt. _____
Spec. Inv. _____
Training _____
Telephone Rm. _____
Director Sec'y _____

PURPOSE: Memorandum advises of the filing
of an opinion by the United States
Court of Appeals for the Ninth Circuit on 9/30/76 in
captioned matter.

SYNOPSIS: On 9/30/76, United States Court of
Appeals for the Ninth Circuit issued
an opinion on whether the provisions of Title 5, United
States Code, Section 552 (a)(6)(C), which allow for a
stay of proceedings in FOIA suits, can be based on the
FBI backlog and current processing effort. The Court
held that it can but adopted the reasoning of Judge
Leventhal in the Open America case. *WJ*

RECOMMENDATION: None. For information.

for pfr

APPROVED:	Ext. Affairs.....	Laboratory.....
Assoc. Dir.....	Fin. & Pers.....	Legal Coun.....
Dep. AD Adm.....	Gen. Inv.....	Plan. & Insp.....
Dep. AD Inv.....	Ident.....	Rec. Mgnt..... <i>AD/2B</i>
Asst. Dir.:	Intell.....	Spec. Inv.....
Adm. Serv.....		Training.....

DETAILS: On 9/30/76, United States Court of
Appeals for the Ninth Circuit filed
an opinion which is attached hereto in captioned matter
on the issue of whether the FBI backlog in processing

Enclosure

1 - [redacted]
Attn: [redacted] **EX 104**
1 - Mr. Mintz **REC-52**
1 - [redacted]

EPM:rml *gnd*
(4) *2* **ENCLOSURE**

62-116929-17

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CONTINUED - OVER



54 NOV 16 1976

309

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

Memorandum to Assistant Director

Records Management Division

Re: Judith Katherine Exner v. Federal Bureau of
Investigation, et al., (U.S.D.C., S. D. OF CALIFORNIA),
CIVIL ACTION NO. 76-89-SA

FOIA requests constitutes exceptional circumstances within the meaning of Title 5, United States Code, Section 552 (a) (6) (C) which allows the Court to retain jurisdiction upon the showing of exceptional circumstances and due diligence. This Court adopted the reasoning of the District of Columbia Circuit in Open America, et al. v. The Watergate Special Prosecution Force, et al., "to the extent it is concurred in by Judge Leventhal." It will be recalled that Judge Leventhal criticized the majority opinion in that he felt that the decision was overly broad and placed the burden on the plaintiff to show a "genuine need and reason for urgency." He also objected to the majority's assumption that "the Department's troubles in meeting FOIA's time limits will continue," and seeking "to justify those failures in advance." In short, Judge Leventhal would leave to the discretion of District Court whether the assertion of Title 5, United States Code, Section 552 (a) (6) (C), judged on a case-by-case basis, is valid.

b6
b7C

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P.O. Box 517
San Francisco, California 94101

September 30, 1976

RE: 76-1903, JUDITH KATHERINE EXNER VS. FBI, et al.

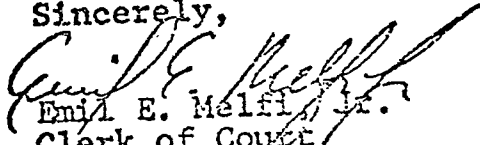
Dear

An opinion was filed and a judgment entered
in the above case today, Sept. 30, 1976,
remanding the case to the judgment of
the court below (or administrative agency).

You have (14) days, from the above date, in
which to file a petition for rehearing.

The mandate of this court shall issue (21)
days after entry of judgment unless the court
enters an order otherwise. If a petition for
rehearing is filed and denied, the mandate will
issue (7) days after the entry of the order
denying the petition.

Sincerely,


Emil E. Meffert, Jr.
Clerk of Court

See Rules: 36, 40(a) and 41(a) of the Federal
Rules of Appellate Procedure

CO 76.2

FILED

SEP 30 1978

EMIL E. MELFI, JR.
CLERK, U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUDITH KATHERINE EXNER,
Plaintiff-Appellee,
v.
FEDERAL BUREAU OF INVESTIGATION,
et al.,
Defendants-Appellants.

No. 76-1903

O P I N I O N

On Appeal from the United States District Court
for the Southern District of California.

Before: BARNES and GOODWIN, Circuit Judges, and
TAKASUGI, District Judge.*

BARNES, Senior Circuit Judge:

This action in the district court was brought to compel disclosure to plaintiff within certain specified time limits of information sought from the files of the Federal Bureau of Investigation (herein FBI) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Privacy Act of 1974, 5 U.S.C. § 552a.

It has no relation to any flat refusal by the FBI to act, but to the FBI's refusal (a) to act until it has treated all previous requests, seriatim; and (b) to act until it has satisfied both itself and, in certain matters, the Department of Justice (of which the FBI is a part), that the requested material can properly be made available. It thus deals with what time compliance the courts should order;

* The Honorable Robert M. Takasugi, District Judge, Central District of California, sitting by designation.

1. not on/^a flat or blanket refusal of the FBI to comply with
2. plaintiff's demands.

3. The primary problem is that precise time limits
4. were placed by the Congress on the furnishing of such infor-
5. mation by the FBI, which bear no relation in actual practice
6. to the multiple demands placed upon it, or to the capacity
7. of the FBI work force to do the careful and thorough exami-
8. nation required on each such demand.

9. To put it in another way, the procedures adopted
10. by the FBI in servicing citizens' demands (such as the
11. seriatim consideration of each demand, based almost (but not
12. entirely) on the earliest date of filing the demand) are
13. said to violate the intent of Congress as expressed in
14. 5 U.S.C. § 552(a)(6)(C) which provides:

15. "If the Government can show exceptional
16. circumstances exist and that the agency is
17. exercising due diligence in responding to
18. the request, the court may retain jurisdiction
and allow the agency additional time to complete
its review of the records." (Emphasis added.)

19. It is obvious that the foregoing paragraph gives
20. the district court discretion to allow the government
21. additional time to comply. Here the district court declined
22. to grant further time. There is no showing that in doing so
23. it abused its discretion. Instead, the district judge ordered
24. partial immediate compliance.^{1/} Instead of complying, the
25. government filed in the district court an ex parte motion,
26. based on 5 U.S.C. § 552(a)(6)(C), seeking a stay of plaintiff
27. Exner's civil action pending "government review" of any
28. Exner files.

29. The government argued that the huge number and
30. volume of demands under the Act had created a backlog and
31. that it was impossible to fulfill Exner's demand without
32. giving her preference over other parties who had filed their

1 demands at an earlier date. Thus, the government asserted
2 that in order to maintain its "first come - first served"
3 policy, Exner should await her turn. On April 20, 1976,
4 the district judge denied the government's motion for a stay.
5 It is from this order which the government appeals.

6 The issue thus raised is apparently one of first
7 impression in this Circuit. Fortunately, one other Circuit
8 (the District of Columbia Circuit) has considered the problem
9 in Open America, et al. v. The Watergate Special Prosecution
10 Force, et al., No. 76-1371, ___ F.2d ___ (decided July 7,
11 1976).

12 In that case, and this, the government's defense
13 was that "exceptional circumstance" and "due diligence" was
14 being exercised by the government. While all three judges
15 on the District of Columbia Circuit concurred in the result,
16 the majority (Judges MacKinnon and Wilkey) painted with a
17 broad brush, and according to the concurring judge (Judge
18 Leventhal), went

19 "beyond the holding which . . . requires this
20 case to be remanded to the district court for
21 further proceedings, delivers dictum accepting
22 the broad premise for relief asserted by the
23 Department of Justice, dictum in which I do
24 not join."

25 It is not necessary to repeat or discuss the
26 reasoning behind Judge Leventhal's opinion, for it is well
27 stated therein. We accept and approve the majority opinion
28 to the extent it is concurred in by Judge Leventhal. We hold
29 the "first in - first out" consideration of demands, based
30 on date of filing with the FBI, ordinarily seems reasonable,
31 and we hold that the filing of suit by a person demanding
32 information can (but does not necessarily) move such peti-
tioner "up the line," i.e. create a preference, particularly
if a Federal Court orders it.

1 We note that some 400 documents have already been
2 delivered to plaintiff's attorney by the FBI, and that others
3 are being evaluated by persons employed without the FBI,
4 but by the Justice Department. This recent factual development
5 has answered some (but not all) of the questions the district
6 court ordered answered.

7 We therefore vacate the order of the district court
8 appealed from herein, and remand the case for a determination
9 whether this appellant-defendant is entitled to any relief
10 under 5 U.S.C. § 522(a)(6)(C), in light of the FBI's burden
11 of proof to establish (1) the existence of "exceptional
12 circumstances," (2) that the agency has and is exercising
13 due diligence, and (3) in accordance with this opinion.
14 In other words, the district court still has the right to
15 exercise its discretion in passing on the newly developed
16 facts.

17 REMANDED.
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1 FOOTNOTE

2 1/

3 The district court ordered the government within
4 15 days:

5 (1) To file the following information:

6 (a) Whether the FBI has any files relating to
7 plaintiff;

8 (b) If such a file exists, a description of
9 the file by size; and

10 (c) If such a file exists, a detailed list
11 of any exemptions claimed by the government.

12 (2) To make immediately available to plaintiff all
13 documents as to which there is no claim of
14 exemption.

15 (3) To refrain from disclosing the contents of the
16 files to any other person until plaintiff
17 could review it.



THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

NOV 22 1976

FEDERAL BUREAU OF INVESTIGATION
U.S. DEPARTMENT OF JUSTICE

Richard D. Leonard, Esquire
433 North Camden Drive
Suite 1200
Beverly Hills, California 90210

Dear Mr. Leonard:

This is in further response to the pending administrative appeal of your client, Ms. Judith Campbell Exner, concerning the handling by the Federal Bureau of Investigation of her request for access to records pertaining to herself. A partial release of the records within the scope of your client's request has been made by the Bureau and my consideration has extended only to those records which were withheld, in whole or in part.

After careful consideration of this appeal, I have decided to modify the action of Director Kelley. By copy of this letter I am requesting the Bureau to release certain additional material to you, including one serial of two pages not previously released. Other records will now be released with fewer excisions than before. In addition, there is a limited number of other records in Bureau files which pertain to your client, but which contain only the same substantive information which you either have been, or soon will be, provided. If you desire copies of these particular records, simply notify my Freedom of Information and Privacy Appeals Unit and they will be provided. The records which will continue to be withheld are considered by me to be exempt from mandatory release under the Act pursuant to one or more of the following statutory provisions: 5 U.S.C. 552(b)(2), (7)(C), (7)(D) and (7)(F). These relate, respectively, to certain purely internal agency practices and to investigatory records compiled for law enforcement purposes, the release of which would constitute an unwarranted invasion of personal privacy, disclose the identities of confidential sources and endanger the lives or personal safety of law enforcement personnel. There are no reasonably segregable, nonexempt portions

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V-16 REC-7

62-116929-18
5 JAN 4 1977

55 JAN 3 1977

of any of the withheld materials that can be released to your client. I do not consider that release of any of the withheld materials as a matter of my discretion would be appropriate.

Although I am fully aware of the fact that this matter is already in litigation, I am required by law and Departmental Regulations to advise you fully of your client's right to judicial review of my decision on this administrative appeal. Such review is available to her in the United States District Court for the judicial district in which she resides, or in which she has her principal place of business, or in the District of Columbia, which is also where the records to which she seeks access are located.

Very truly yours,

Harold R. Tyler, Jr.
Deputy Attorney General

UNITED STATES GOVERNMENT

Memorandum

TO : [REDACTED]

DATE: 12/21/76

FROM : [REDACTED]

SUBJECT: FREEDOM OF INFORMATION-PRIVACY ACTS (FOIPA)
FREEDOM OF INFORMATION APPEAL OF MS. JUDITH CAMPBELL EXNER

Assoc. Dir. _____
Dep. AD Adm. _____
Dep. AD Inv. _____
Asst. Dir.:
Adm. Serv. _____
Ext. Affairs _____
Fin. & Pers. _____
Gen. Inv. _____
Ident. _____ b6
Inspection _____ b7C
Intell. _____
Laboratory _____
Legal Coun. _____
Plan. & Eval. _____
Rec. Mgmt. _____
Spec. Inv. _____
Training _____
Telephone Rm. _____
Director Sec'y _____

PURPOSE

To inform you of the outcome of an administrative appeal filed by Ms. Judith Campbell Exner through her attorney, Mr. Richard D. Leonard, with the Department of Justice's Appeals Unit. In accordance with the Deputy Attorney General's instructions, President Kennedy's identity, previously excised, is now being released.

DETAILS

Because of the importance of this material, on 12/6/76 the impact and full ramifications of this release were personally discussed with Mr. Quinlan J. Shea, Jr., Chief of the Freedom of Information Appeals Unit, and thereafter with Mr. Harold P. Tyler, Jr., Deputy Attorney General. The Bureau was represented at these discussions by Inspector Powers, SA's [REDACTED]. The Bureau's position at this meeting was that the name of President John F. Kennedy should be deleted from any releases made to Ms. Exner as it would be an invasion of the privacy of the Kennedy family. Mr. Shea disagreed with this position and ordered the release of the President's name.

Attached to this memorandum you will find additional documents released to Ms. Exner. The information outlined in red is the information Mr. Shea decided to

1 - [REDACTED]
1 - [REDACTED]
1 - [REDACTED]

JFD:mjg (6)

Enc. (6)

REC-71

62-116928-19

5 JAN 4 1977



Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

FBI/DOJ

Memorandum to [redacted]

RE: FREEDOM OF INFORMATION-PRIVACY ACTS (FOIPA)

FREEDOM OF INFORMATION APPEAL OF MS. JUDITH CAMPBELL EXNER

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b7c

withhold. Mr. Tyler subsequently upheld the amended release which disclosed the identity of former President Kennedy. His reasoning, therefore, is set forth in attached "Action Memorandum."

RECOMMENDATION

For information only.

Enclosures (7) *JP*

APPROVED: _____	Adm. Serv.....	Legal Coun.....
	Ext. Affairs.....	Plan. & Insp.....
Director.....	Fin. & Pers.....	Rec. Mgt..... <i>JP</i>
Assoc. Dir.....	Gen. Inv.....	S. & T. Serv.....
Dep. AD Adm. <i>MD</i>	Ident.....	Spec. Inv.....
Dep. AD Inv.....	Intell.....	Training.....

UNITED STATES GOVERN. NT

Memorandum

TO : MR. BELMONT *also*

DATE: March 15, 1962

FROM : C. A. EVANS *car*SUBJECT: JUDITH E. CAMPBELL
aka Judy Campbell
INFORMATION CONCERNING

Tolson	_____
Belmont	_____
Mohr	_____
Callahan	_____
Conrad	_____
DeLoach	_____
Evans	_____
Malone	_____
Rosen	_____
Sullivan	_____
Tavel	_____
Trotter	_____
Tele. Room	_____
Holmes	_____
Gandy	_____

Campbell is a paramour of John Roselli, West Coast hoodlum. In the investigation of Roselli, we determined that on November 7 and 15, 1961, Campbell made telephone calls from her residence in Los Angeles to Mrs. Evelyn Lincoln, secretary to the President, at the White House. The information indicating Campbell called the White House was forwarded to Mr. Kenneth O'Donnell of the White House and to the Attorney General in letters dated February 27, 1962.

SAC Simon of the Los Angeles Office telephonically furnished the following information today regarding Judy Campbell. SA [] of the Los Angeles Office, while in the U. S. Court House, was approached by [] who is a private investigator on the West Coast whose reputation is questionable. [] remarked to the Agent that he had been in Jerry Lewis's place last week (Jerry Lewis is the well-known comedian). While there, [] stated he observed Judy Campbell with John Roselli. [] further remarked that he wondered what Roselli was doing with Campbell. He then made the statement that Campbell is the girl who was "shacking up with John Kennedy in the East." According to Simon at the same time this statement was made by [] other persons appeared and no further statement was made by [] in this connection. The Agent, of course, made no comment.

With reference to [] he is an enterprising private investigator whose ethics are open to serious question. We know that he has been approached in the past by [] associated with Jimmy Hoffa, to work for Hoffa collecting information on the identity of prostitutes who might have had association with members of the Kennedy family. [] reportedly told [] at the time of this contact that Hoffa was out to "bury the Kennedys." It is not known whether [] ever actually assisted [] in any such venture. (This information previously furnished to the Attorney General.)

ACTION:

REC-37

SAC Simon stated this was being furnished to the Bureau as a matter of information. We currently have John Roselli under intensive investigation under our Criminal Intelligence program. In connection with this investigation, the Los Angeles Office has previously been instructed to develop information

1 - Mr. Rosen

CHS:dlb

-34 APR 3 1962

ENCLOSURE

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Memorandum to Mr. Belmont
RE: JUDITH E. CAMPBELL

concerning Judy Campbell, with particular reference to her connections with John Roselli, Samuel Giancana and other nationally known hoodlums.

The Los Angeles Office will furnish any pertinent information received.

Bw

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UNITED STATES GOVERNMENT

Memorandum

TO :

DATE: March 15, 1962

FROM :

SUBJECT: JUDITH E. CAMPBELL
 aka Judy Campbell
 INFORMATION CONCERNING

Campbell is a paramour of John Roselli, West Coast hoodlum. In the investigation of Roselli, we determined that on November 7 and 15, 1961, Campbell in Los Angeles to at the White House. The information indicating Campbell called the White House was forwarded to of the White House and to the Attorney General in letters dated February 27, 1962.

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RE: JUDITH E. CAMPBELL

concerning Judy Campbell, with particular reference to her connections with John Roselli, Samuel Giancana and other nationally known hoodlums.

The Los Angeles Office will furnish any pertinent information received.

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V

Ean

TO : Mr. Belmont

DATE: 8/17/62

Sullivan _____
Tavel _____
Trotter _____
Tele. Room _____
Holmes _____
Gandy _____

FROM : C. A. Evans *E. Evans*

SUBJECT: JOHN ROSELLI
ANTI-RACKETEERING

John Roselli is the subject of intensified investigation in California in connection with the Criminal Intelligence Program. During our investigation of Roselli we picked up information connecting John Roselli with Judith Campbell who we have determined has been in telephonic contact with Sant Giancana, Chicago gangster and with other underworld figures. In addition, she is the individual who has been in telephonic contact with Evelyn Lincoln, the President's secretary at the White House. The nature of the relationship between Campbell and Mrs. Lincoln is not known. However, one [redacted] a private investigator of questionable reputation in Los Angeles, has alleged that Judith Campbell at one time had an affair with President Kennedy. The information concerning Campbell's contacts with the President's secretary has been furnished previously to the White House and the Attorney General.

In connection with the investigation of Roselli and Campbell, our Los Angeles office has been maintaining an observation post on the apartment of Judith Campbell. On 8/7/62 one of our Los Angeles agents observed two men on the balcony of Judith Campbell's apartment. According to our Los Angeles office, Campbell resides in a second floor apartment at the front of the building and access to her balcony is through a public corridor on the second floor of the apartment building, which corridor leads to a door opening out on the balcony. One of these men was observed to knock on the window of Campbell's apartment and then enter the apartment. It could not be determined whether the man who went into the apartment took anything from the apartment with him when he departed. According to Los Angeles, Campbell was not in her apartment at the time of the entry. Subsequently, a man answering the description of the individual who entered Campbell's apartment was observed leaving the area in an automobile registered to [redacted]

Our Dallas Office has advised that former [redacted]

1 - Administrative Division

56 SEP 3 1962
JEK:maw

(7)

AUG 31 1962

AUG 29 1962

SENT DIRECTOR
8-13-62

22 AUG 28 1962

PERS. REC. UNIT

ENCLOSURE

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ACTION:

We are maintaining our observation post and any additional pertinent information obtained as a result of our inquiries in this investigation which can clarify this situation will be immediately reported to the Bureau for appropriate action.

-2-

Memorandum

TO :

DATE: 8/17/62

FROM :

SUBJECT:

JOHN ROSELLI
ANTI-RACKETEERING

John Roselli is the subject of intensified investigation in California in connection with the Criminal Intelligence Program. During our investigation of Roselli we picked up information connecting John Roselli with Judith Campbell who we have determined has been in telephonic contact with Sam Giancana, Chicago gangster and with other underworld figures. In addition, she is the individual who has been in telephonic contact with the White House. The nature of the relationship between Campbell and [redacted] is not known. However, one [redacted] of questionable reputation in Los Angeles, has alleged that Judith Campbell at one time had an affair with [redacted]. The information concerning Campbell's contacts with [redacted] has been furnished previously to the White House and the Attorney General.

In connection with the investigation of Roselli and Campbell, our Los Angeles office has been maintaining an observation post on the apartment of Judith Campbell. On 8/7/62 one of our Los Angeles agents observed two men on the balcony of Judith Campbell's apartment. According to our Los Angeles office, Campbell resides in a second floor apartment at the front of the building and access to her balcony is through a public corridor on the second floor of the apartment building, which corridor leads to a door opening out on the balcony. One of these men was observed to knock on the window of Campbell's apartment and then enter the apartment. It could not be determined whether the man who went into the apartment took anything from the apartment with him when he departed. According to Los Angeles, Campbell was not in her apartment at the time of the entry. Subsequently, a man answering the description of the individual who entered Campbell's apartment was observed leaving the area in an automobile registered to [redacted].

An associate has indicated to the Dallas Office that one of had obtained a Chevrolet sports car and was possibly in California. According to our Los Angeles agents, the man observed leaving the vicinity of Campbell's apartment did so in a Chevrolet Corvette which is a sports car.

The description of is generally similar to that of the man who entered Campbell's apartment.

ACTION:

In view of the highly sensitive nature of our inquiries concerning Campbell and the fact we are uncertain that the individual we observed entering the apartment is identical with the person seen driving away in a Chevrolet sports car the above information is not being disseminated to the Los Angeles Police Department at this time.

We are maintaining our observation post and any additional pertinent information obtained as a result of our inquiries in this investigation which can clarify this situation will be immediately reported to the Bureau for appropriate action.

March 26, 1962

TO MR. BELMONT

FROM C. A. EVANS

Judith E. Campbell, referred to in the attached airtel, has associated with prominent underworld figures Sam Giancana and John Roselli.

A review of telephone toll calls from Campbell's Los Angeles residence reveals that on November 7 and 15, 1961, calls were made to Evelyn Lincoln, the President's secretary at the White House.

Telephone toll calls were charged to Campbell to Mrs. Lincoln at the White House on November 10 and 13, 1961.

Campbell was also charged with a call to Mrs. Lincoln on February 14, 1962, at Cedars of Lebanon Hospital in Los Angeles, where Campbell was a patient at that time.

The nature of the relationship between Campbell and Mrs. Lincoln is not known.

a Los Angeles private investigator of questionable reputation, referred to Campbell as the girl who was "shacking up with John Kennedy in the East."

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ENCLOSURE

62-116928-19

March 26, 1962

Judith E. Campbell, referred to in the attached airtel, has associated with promine: underworld figures Sam Giancana and John Roselli.

The nature of the relationship between Campbell and is not known.

of questionable reputation, referred to Campbell as the girl who was "shacking up with ~~XXXXXXXXXX~~ in the East."

V Q

February 27, 1962

BY COURIER SERVICE

Honorable P. Kenneth O'Donnell
Special Assistant to the President
The White House
Washington, D. C.

My dear Mr. O'Donnell:

I thought you would be interested in learning of the following information which was developed in connection with the investigation of John Roselli, a West Coast hoodlum. Roselli has been in contact with Judith E. Campbell, a Los Angeles free-lance artist.

A review of telephone toll calls from Campbell's residence disclosed that on November 7 and 15, 1961, calls were made to Evelyn Lincoln, the President's Secretary, at the White House.

The relationship between Campbell and Mrs. Lincoln or the purpose of these calls is not known.

Information has also been developed that Campbell has been in contact with Sam Giancana, a prominent Chicago underworld figure.

In the event additional information is received regarding this matter, you will be immediately advised.

Sincerely yours,

J. Edgar Hoover

NOTE: See cover memo Evans to Belmont, 2/26/62, same caption,

JEK:rmk,asg

JEK:asg:mac

(7)

Evans

Malone

Rosen

Sullivan

Tavel

Trotter

Tele. Room

Ingram

Gandy

MAIL ROOM ☐ TELETYPE UNIT ☐

REC'D-READING ROOM

FBI

FEB 27 3 49 PM '62

BY COURIER SVC.
98 FEB 28
COMM-FBI

FEB 28 11 03 AM '62

FEB 28 10 10 AM '62

REC'D DIRECTOR

92-3267-125

19 MAR 1 1962

51 MAR 5 1962

97-3267-125
February 27, 1962

BY COURIER SERVICE

Honorable
Special Assistant to the President
The White House
Washington, D. C.

My dear

I thought you would be interested in learning of the following information which was developed in connection with the investigation of John Roselli, a West Coast hoodlum. Roselli has been in contact with Judith E. Campbell, a Los Angeles free-lance artist.

[redacted] disclosed that on November 7 and 15, 1961, calls were made to [redacted] Secretary, at the White House.

The relationship between Campbell and or the purpose of these calls is not known.

Information has also been developed that Campbell has been in contact with Sam Giancana, a prominent Chicago underworld figure.

In the event additional information is received regarding this matter, you will be immediately advised.

Sincerely yours,

J. Edgar Hoover

REC'D-READING ROOM
FBI
FEB 27 9 45 PM '62
125
MAR 1 1962

The Attorney General

February 27, 1962

Director, FBI

REC-12

92-3267 126

EX-113

JOHN ROSELLI
ANTI-RACKETEERING

REC'D-READING ROOM

FEB 27 3 49 PM '62

Information has been developed in connection with the investigation of John Roselli, one of the second group of forty hoodlums receiving concentrated attention, that he has been in contact with Judith E. Campbell.

A review of the telephone toll calls from Campbell's Los Angeles residence discloses that on November 7 and 15, 1961, calls were made to Evelyn Lincoln, the President's Secretary, at the White House.

The relationship between Campbell and Mrs. Lincoln or the purpose of these calls is not known.

Information has also been developed that Campbell has associated with Sam Giancana, a prominent Chicago underworld figure.

Campbell, a free-lance artist, is divorced from

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This information is being made available to Honorable P. Kenneth O'Donnell, Special Assistant to the President.

You will be advised of all significant developments in this matter.

- 1 - The Deputy Attorney General
- 1 - Mr. Herbert J. Miller, Jr.
Assistant Attorney General

MAILED 30
FEB 28 1961
COMM-FBI

- Tolson
- Belmont
- Mohr
- Callahan
- Conrad
- DeLoach
- Evans
- Malone
- Rosen
- Sullivan
- Tavel
- Trotter
- Tele. Room
- Ingram
- Gandy

See cover memo Evans to Belmont 2/26/62 captioned as above.

JEK:rmk, asg.

JEK: asg. [unclear]

63 MAR 7 1962

MAIL ROOM ☐ TELETYPE UNIT ☐

ENCLOSURE

Xeroxed to Senate Select Committee 9/16/75

92-3267-126

The Attorney General

February 27, 1962

Director, FBI

REC-12

92-3267-126

EX-113

JOHN ROSELLI

ANTI-RACKETEERING

REC'D-READING ROOM

Information has been developed in connection with the investigation of John Roselli, one of the second group of forty hoodlums receiving concentrated attention, that he has been in contact with Judith E. Campbell.

LB I

~~_____~~ discloses that on November 7 and 15, 1961, calls were made to ~~_____~~ Secretary, at the White House.

The relationship between Campbell and ~~_____~~ or the purpose of these calls is not known.

Information has also been developed that Campbell has associated with Sam Giancana, a prominent Chicago underworld figure.

Campbell, a free-lance artist, is divorced from ~~_____~~

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This information is being made available to Honorable ~~_____~~ Special Assistant to the President.

You will be advised of all significant developments in this matter.

- 1 - The Deputy Attorney General
- 1 - Mr. Herbert J. Miller, Jr. Assistant Attorney General

✓

FEB 28 1961

COMM-FBI

RECEIVED

UNITED STATES GOVERNMENT

Memorandum

Tolson _____
 Belmont _____
 Mohr _____
 Callahan _____
 Conrad _____
 DeLoach _____
 Evans _____
 Malone _____
 Rosen _____
 Sullivan _____
 Tavel _____
 Trotter _____
 Tele. Room _____
 Holmes _____
 Gandy _____

TO : Mr. Belmont

DATE: March 20, 1962

FROM : C. A. Evans

SUBJECT: ^X JUDITH E. CAMPBELL
 ASSOCIATE OF HOODLUMS
 CRIMINAL INTELLIGENCE MATTER

Kennedy, John F.

There is attached a restatement of information relating to telephone calls made to the President's Secretary from Judith Campbell's Los Angeles residence.

This is being submitted as the Director may desire to bear this information in mind in connection with his forthcoming appointment with the President.

Enclosure

AAS rap
 (6)

NOT PREVIOUSLY RELEASED

ENCLOSURE

62-116929-19

B



UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

In Reply, Please Refer to
File No.

WASHINGTON 25, D. C.

March 20, 1962

JUDITH E. CAMPBELL
LOS ANGELES, CALIFORNIA

Information has been developed that Judith E. Campbell, a free-lance artist, has associated with prominent underworld figures Sam Giancana of Chicago and John Roselli of Los Angeles.

A review of telephone toll calls from Campbell's Los Angeles residence discloses that on November 7 and 15, 1961, calls were made to Evelyn Lincoln, the President's Secretary at the White House.

Telephone toll calls were charged to residence Campbell rented in Palm Springs, California, to Evelyn Lincoln at the White House on November 10, 1961, and November 13, 1961.

Campbell was also charged with a call to Mrs. Lincoln on February 14, 1962, from Cedars of Lebanon Hospital in Los Angeles, where Campbell was a patient at the time.

The nature of the relationship between Campbell and Mrs. Lincoln is not known.

[redacted] a Los Angeles private investigator of questionable reputation, advised that he has seen Campbell with John Roselli. [redacted] referred to Campbell as the girl who was "shacking up with John Kennedy in the East."

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b7C

0
NOT PREVIOUSLY RELEASED

December 21, 1976

1 - Mr. Mintz
Legal Counsel

Richard D. Leonard, Esq.
Suite 1200
433 North Camden Drive
Beverly Hills, California 90210

OUTSIDE SOURCE

Dear Mr. Leonard:

This is in further response to your administrative appeal under the Freedom of Information Act from the partial denial by the Federal Bureau of Investigation of your request for access to records pertaining to your client, Ms. Judith Campbell Exner.

As a result of your administrative appeal to the Department of Justice, documents from our central files were reviewed with a staff member of the Department's Freedom of Information Act Appeals Unit. Pursuant to this review, additional portions of five documents previously released to you are being disclosed.

Also, one additional document previously withheld is being released. Excisions have been made from this document in order to protect material which is exempted from disclosure pursuant to Subsections (b)(2) (material related solely to the internal rules and practices of the FBI) and (b)(7)(C) (unwarranted invasion of the personal privacy of a third party) of Title 5, United States Code, Section 552.

REC-7
Sincerely yours, 62-116729-20

G. M. Kelley

Clarence H. Kelley
Director

5 JAN 4 1977

Assoc. Dir. _____
Dep. AD Adm. _____
Dep. AD Inv. _____
Asst. Dir.: _____
Adm. Serv. _____
Ext. Affairs _____
Fin. & Pers. _____
Gen. Inv. _____
Ident. _____
Inspection _____
Intell. _____
Laboratory _____
Legal Coun. _____
Plan. & Eval. _____
Rec. Mgnt. _____
Spec. Inv. _____
Training _____
Telephone Rm. _____
Director's Sec'y _____

Enclosures

JFL:mjg (8)

MAIL ROOM ☒

TELETYPE UNIT ☐

Richard D. Leonard, Esq.

- 1 - Assistant Attorney General for Administration
Attention: FOIPA Administrative Unit (Room 1134)
- 1 - The Deputy Attorney General
Attention: Quinlan J. Shea, Jr.
- 1 - ADIC, Los Angeles (FOIPA Information)

NOTE for ADIC, Los Angeles (FOIPA Information) - Because of the importance of this material, the impact and full ramifications of this release were personally discussed with Mr. Quinlan J. Shea, Jr., Chief of the Freedom of Information and Privacy Appeals Unit, and thereafter with Mr. Harold R. Tyler, Jr., Deputy Attorney General, on 12/6/76. Release of this additional information is being made upon the instructions of DAG Tyler, and the documents released will reveal the identity of former President Kennedy.

APPROVED:	Adm. Serv.	Legal Coun.....
Director	Ext. Affairs	Plan. & Insp.
Assoc. Dir.....	Fin. & Pers.	Rec. Mgmt.
Dep. AD Adm.	Gen. Inv.	S. & T. Serv.
Dep. AD Inv.	Ident.	Spec. Inv.
	Intell.	Training.....

UNITED STATES GOVERNMENT

Memorandum

TO : MR. BELMONT *albr*

DATE: March 15, 1962

FROM : C. A. EVANS *can*SUBJECT: JUDITH E. CAMPBELL
aka Judy Campbell
INFORMATION CONCERNING

Campbell is a paramour of John Roselli, West Coast hoodlum. In the investigation of Roselli, we determined that on November 7 and 15, 1961, Campbell made telephone calls from her residence in Los Angeles to Mrs. Evelyn Lincoln, secretary to the President, at the White House. The information indicating Campbell called the White House was forwarded to Mr. Kenneth O'Donnell of the White House and to the Attorney General in letters dated February 27, 1962.

SAC of the Los Angeles Office telephonically furnished the following information today regarding Judy Campbell. SA of the Los Angeles Office, while in the U. S. Court House, was approached by who is a private investigator on the West Coast whose reputation is questionable. remarked to the Agent that he had been in place last week. While there, stated he observed Judy Campbell with John Roselli. Further remarked that he wondered what Roselli was doing with Campbell. He then made the statement that Campbell is the girl who was "shacking up with John Kennedy in the East." According to at the same time this statement was made by other persons appeared and no further statement was made by in this connection. The Agent, of course, made no comment.

92-3267-158

released on appeal

ACTION:

SAC stated this was being furnished to the Bureau as a matter of information. We currently have John Roselli under intensive investigation under our Criminal Intelligence program. In connection with this investigation, the Los Angeles Office has previously been instructed to develop information

ENCLOSURE

62-116929-20 *158*

A

Memorandum to Mr. Belmont
RE: JUDITH E. CAMPBELL

concerning Judy Campbell, with particular reference to her connections with John Roselli, Samuel Giancana and other nationally known hoodlums.

The Los Angeles Office will furnish any pertinent information received.

B₂

V

Eas

TO : Mr. Belmont

DATE: 8/17/62

FROM : C. A. Evans *E. J. Evans*

SUBJECT: ⁽¹⁾ JOHN ROSELLI
ANTI-RACKETEERING

1 John Roselli is the subject of intensified investigation in California in connection with the Criminal Intelligence Program. During our investigation of Roselli we picked up information connecting John Roselli with Judith Campbell who we have determined has been in telephonic contact with Sam Giancana, Chicago gangster and with other underworld figures. In addition, she is the individual who has been in telephonic contact with Evelyn Lincoln, the President's secretary at the White House. The nature of the relationship between Campbell and Mrs. Lincoln is not known. However, one _____ a private investigator of questionable reputation in Los Angeles, has alleged that Judith Campbell at one time had an affair with President Kennedy. The information concerning Campbell's contacts with the President's secretary has been furnished previously to the White House and the Attorney General.

In connection with the investigation of Roselli and Campbell, our Los Angeles office has been maintaining an observation post on the apartment of Judith Campbell. On 8/7/62 one of our Los Angeles agents observed two men on the balcony of Judith Campbell's apartment. According to our Los Angeles office, Campbell resides in a second floor apartment at the front of the building and access to her balcony is through a public corridor on the second floor of the apartment building, which corridor leads to a door opening out on the balcony. One of these men was observed to knock on the window of Campbell's apartment and then enter the apartment. It could not be determined whether the man who went into the apartment took anything from the apartment with him when he departed. According to Los Angeles, Campbell was not in her apartment at the time of the entry. Subsequently, a man answering the description of the individual who entered Campbell's apartment was observed leaving the area in an automobile registered to

92-3267-30

92-3267-303
released on appeal

ENCLOSURE

62-116929-20

Memorandum to Mr. Belmont
RE: JOHN ROSELLI

An associate of _____ has indicated to the Dallas Office that one of _____ had obtained a Chevrolet sports car and was possibly in California. According to our Los Angeles agents, the man observed leaving the vicinity of Campbell's apartment did so in a Chevrolet Corvette which is a sports car.

The description _____ is generally similar to that of the man who entered Campbell's apartment.

ACTION:

In view of the highly sensitive nature of our inquiries concerning Campbell and the fact we are uncertain that the individual we observed entering the apartment is identical with the person seen driving away in a Chevrolet sports car registered to _____ the above information is not being disseminated to the Los Angeles Police Department at this time.

We are maintaining our observation post and any additional pertinent information obtained as a result of our inquiries in this investigation which can clarify this situation will be immediately reported to the Bureau for appropriate action.

March 26, 1962

TO MR. BELMONT

FROM C. A. EVANS

Judith E. Campbell, referred to in the attached airtel, has associated with prominent underworld figures Sam Giancana and John Roselli.

A review of telephone toll calls from Campbell's Los Angeles residence reveals that on November 7 and 15, 1961, calls were made to Evelyn Lincoln, the President's secretary at the White House.

Telephone toll calls were charged to Campbell to Mrs. Lincoln at the White House on November 10 and 13, 1961.

Campbell was also charged with a call to Mrs. Lincoln on February 14, 1962, at Cedars of Lebanon Hospital in Los Angeles, where Campbell was a patient at that time.

The nature of the relationship between Campbell and Mrs. Lincoln is not known.

a Los Angeles private investigator of questionable reputation, referred to Campbell as the girl who was "shacking up with John Kennedy in the East."

92-3267-151

released on appeal

62-116929-20

ENCLOSURE

February 27, 1962

BY COURIER SERVICE

FEB 27 3 40 PM '62
REC'D-READING ROOM
FBI

Honorable P. Kenneth O'Donnell
Special Assistant to the President
The White House
Washington, D. C.

My dear Mr. O'Donnell:

I thought you would be interested in learning of the following information which was developed in connection with the investigation of John Roselli, a West Coast hoodlum. Roselli has been in contact with Judith E. Campbell, a Los Angeles free-lance artist.

A review of telephone toll calls from Campbell's residence disclosed that on November 7 and 15, 1961, calls were made to Evelyn Lincoln, the President's Secretary, at the White House.

The relationship between Campbell and Mrs. Lincoln or the purpose of these calls is not known.

Information has also been developed that Campbell has been in contact with Sam Giancana, a prominent Chicago underworld figure.

In the event additional information is received regarding this matter, you will be immediately advised.

Sincerely yours,

J. Edgar Hoover

NOTE: See cover memo Evans to Belmont 2/26/62, same caption.

JEK:rmk, asg

JEK: asg:mac

(7)

92-3267-125
released on appeal

62-116927-20

19 MAR 1 1962

The Attorney General

February 27, 1962

Director, FBI

JOHN ROSELLI
ANTI-RACKETEERING

REC-12

EX-113

92-3267-126

REC'D-READING ROOM

FEB 27 3 49 PM '62

Information has been developed in connection with the investigation of John Roselli, one of the second group of forty hoodlums receiving concentrated attention, that he has been in contact with Judith E. Campbell.

A review of the telephone toll calls from Campbell's Los Angeles residence discloses that on November 7 and 15, 1961, calls were made to Evelyn Lincoln, the President's Secretary, at the White House.

The relationship between Campbell and Mrs. Lincoln or the purpose of these calls is not known.

Information has also been developed that Campbell has associated with Sam Giancana, a prominent Chicago underworld figure.

Campbell, a free-lance artist, is divorced from William Campbell, a television producer.

This information is being made available to Honorable P. Kenneth O'Donnell, Special Assistant to the President.

You will be advised of all significant developments in this matter.

1 - The Deputy Attorney General

1 - Mr. Herbert J. Miller, Jr.
Assistant Attorney General

See cover memo Evans to Belmont 2/26/62 captioned as above.

JEK:rmk, asg.

JEK:asg, asg

(10)

92-3267-126

released on appeal

62-116929-20

FEB 28 1961

COMM-FBI

Memorandum

TO : Mr. Belmont

DATE: March 20, 1962

FROM : C. A. Evans

SUBJECT: ^X JUDITH E. CAMPBELL
ASSOCIATE OF HOODLUMS
CRIMINAL INTELLIGENCE MATTER

^o Kennedy, John F.

There is attached a restatement of information relating to telephone calls made to the President's Secretary from Judith Campbell's Los Angeles residence.

This is being submitted as the Director may desire to bear this information in mind in connection with his forthcoming appointment with the President.

Enclosure

AAS:ap
(6)

*Memo from official and
confidential files of former
Director Hoover
Released on appeal*

62-116929-20

B



UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

In Reply, Please Refer to
File No.

WASHINGTON 25, D. C.

March 20, 1962

JUDITH E. CAMPBELL
LOS ANGELES, CALIFORNIA

Information has been developed that Judith E. Campbell, a free-lance artist, has associated with prominent underworld figures Sam Giancana of Chicago and John Roselli of Los Angeles.

A review of telephone toll calls from Campbell's Los Angeles residence discloses that on November 7 and 15, 1961, calls were made to Evelyn Lincoln, the President's Secretary at the White House.

Telephone toll calls were charged to residence Campbell rented in Palm Springs, California, to Evelyn Lincoln at the White House on November 10, 1961, and November 13, 1961.

Campbell was also charged with a call to Mrs. Lincoln on February 14, 1962, from Cedars of Lebanon Hospital in Los Angeles, where Campbell was a patient at the time.

The nature of the relationship between Campbell and Mrs. Lincoln is not known.

_____ a Los Angeles private investigator of questionable reputation, advised that he has seen Campbell with John Roselli. _____ referred to Campbell as the girl who was "shacking up with John Kennedy in the East."

62-116929-20



OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

MEMORANDUM FOR THE DEPUTY ATTORNEY GENERAL

Re: Freedom of Information Appeal
of Judith Campbell Exner
Attorney: Richard D. Leonard

ACTION MEMORANDUM

Background

Ms. Judith Campbell Exner, through a previous attorney, filed a request with the Federal Bureau of Investigation for copies of all records pertaining to herself. Upon the failure of the Bureau to issue a timely response, she filed this appeal. 1/

Departmental Positions

The Bureau and I are in disagreement as to the disposition of a portion of the records involved in this appeal. W

Facts and Discussion

* The Bureau maintains no main file on Ms. Exner. Information concerning her appears in ninety-two reference serials ["see references"] from the Bureau's central files

REC-7

1/ Upon the failure of the Department to adjudicate this appeal on a timely basis, Ms. Exner filed suit in United States District Court for the Southern District of California. The court denied the Department's motion for a stay of the proceedings and ordered the processing of both the initial request and this administrative appeal. The Bureau subsequently made available a significant amount of material. The Ninth Circuit has since issued a ruling stating that the District Court should not have "ignored" our position on the stay motion and remanding for possible further consideration. Under the circumstances, however, I propose that we simply adjudicate the appeal, as suggested by the Civil Division.

62-116929-21

JAN 4 1977

53 5 JAN 3 1977

E.O. 11652

and one serial from former Director Hoover's "Official and Confidential" ["O.C."] files. Seventy-six of these serials were properly processed by the Bureau, according to our precedents, in the course of its initial review. Content excised from released documents and seven serials which were withheld in their entirety are exempt from mandatory release, in my judgment, pursuant to the routine application of exemption 2 [internal agency practices] and three clauses of the investigatory records exemption, 7(C) [unwarranted invasion of personal privacy], 7(D) [identities of confidential sources] and 7(F) [danger to law enforcement personnel]. Of the material withheld, the Bureau has now agreed to release to Ms. Exner certain portions of eleven serials [other portions of eight of these same serials have already been made available]. The Bureau has, however, objected to the release of portions of five other serials [other portions of four of which have already been made available], on the basis that the releasable substantive information contained therein has been made available to the requester by means of documents already provided. I concur in the factual conclusion that, in every instance, the substantive information contained in these five serials has already been made available to Ms. Exner. In fact, some of these withheld records are merely cover pages of Bureau investigative reports which simply synopsizes the detailed material contained in the reports, which has already been released to her from the bodies of the reports. The Bureau contends that to release the material "again" constitutes an unnecessary administrative burden neither compelled nor contemplated by the Act. I disagree, in accordance with our precedents, and my proposed letter gives Ms. Exner the option in the matter.

My second area of disagreement with the Bureau concerns certain excisions from three documents [two letterhead memoranda dated March 15 and August 17, 1962, plus a note dated March 26, 1962, all three of which were from Mr. Evans to Mr. Belmont] which were among those serials originally released. Copies of these serials, with and without the excisions made by the Bureau, are at Tab A. The considerably fewer excisions I propose are indicated in red on the complete-text copies [administrative markings could also be deleted, to the extent they were previously]. Two of the statements, in quoting an allegation made by a certain private investigator, describe "Campbell" as "the girl who was 'shacking up with John Kennedy in the East.'" The third statement, reflecting the same rumor, notes that "... a private investigator of questionable reputation in Los Angeles, has alleged that Judith Campbell at one time had an affair with President Kennedy." The Bureau excised the name of the former President from these comments and contends that it should continue to be deleted on

the basis of exemption 7(C), on the theory that its release would constitute an unwarranted invasion of the privacies of the Kennedy heirs. In my judgment, the application of this general principle to these particular records is not appropriate. 2/ The Bureau has already released the critical allegation in each document with only the name of the former President deleted. I agree with the release of the allegation, but not with the excision of President Kennedy's name. It is my judgment that release of the name of the former President will not serve to further invade the privacy of the Kennedy family. Given what is in the public domain, taking out his name is nothing but a mechanical application of a general rule in an inappropriate specific context.

The third area of disagreement concerns the Bureau's handling of certain portions of the same three records, as well as two other records [a letter to Kenneth O'Donnell and a memorandum to the Attorney General, both from Director Hoover and both dated February 27, 1962]. These latter items are at Tab B, in both unexcised form and as released by the Bureau; my recommendation is that both of these items be released with no excisions [again, with the possible exception of purely administrative markings]. Certain portions of these five records directly link the requester to the White House, not as a matter of rumor, or mere allegation, but as a matter of fact. It is shown that Ms. Exner was in telephone contact with Ms. Evelyn Lincoln, President Kennedy's personal secretary. Unlike the "shacking up" allegation, the release of which can do no one any real harm, the Bureau has actually released what must be viewed as a significant corroborating fact in support of Ms. Exner's own allegations as to the fact of her relationship with President Kennedy. It also appears from these materials as released that Director Hoover brought all of this information [i.e., Campbell's association with Roselli and Giancana, the allegation about Campbell and President Kennedy and the fact of Campbell's calls to Ms. Lincoln] to the personal

2/ You have previously held that the release of "quite intimate or personal" information about a deceased person could, given the appropriate circumstances, constitute an unwarranted invasion of the privacy of an heir. No. 1507a, National Enquirer and John M. Cathcart. As in the appeal of [redacted] for Sumner Welles material, however, we are dealing here with reports concerning statements of an allegation. We do not know the extent to which the "rumor" circulated in 1962; we do know that its circulation in 1976 [Parade, Nov. 7, 1976, page 2] is widespread. The "gross" invasion of the privacy of the Kennedy heirs on this point has already occurred.

b6
b7C

attention of the Attorney General and the Special Assistant to the President at the White House. When the actual information is coupled with the fact of such action by Director Hoover, it constitutes strong circumstantial corroboration of Ms. Exner's statements that she had an intimate relationship of some duration with President Kennedy. If the privacy of the Kennedy heirs was to be viewed as outweighing the presumed public interest in disclosure in this area, the portions of these five documents showing a definite connection between Ms. Exner and the White House should have been withheld in their entirety. Taking out the names of Ms. Lincoln and Mr. O'Donnell was hardly sufficient to do the job.

Given the situation with which we are confronted, in light of what has already been released, your options are narrow and not particularly attractive. My own view is that the names of Mr. O'Donnell and Ms. Lincoln should be reinstated -- if for no other reason than to avoid looking silly. Given the known (and released) facts that Ms. Exner "called the White House" and "has been in telephonic contact" with someone at the White House and that the "nature of the relationship between Campbell and [excised] is not known," etc., it is obvious we knew that Ms. Campbell/Exner called someone [a Secretary with a capital "S"], but that we did not know why or what was said. By a process of elimination, the fact that our "source" was telephone toll records can be demonstrated -- I believe with logical certainty. The fact that we had access to such information is very persuasive -- although not conclusive -- that the actual telephone companies were our source. For a number of reasons, I propose that this information be reinserted by you as well.

Admitting that we had access to telephone toll records [in this particular case] does minimal violence to our general, overriding principle of protecting source identities. There are two definite benefits to be gained by the course of action I propose, however, both of which redound to the benefit of the F.B.I. First, we show that the Bureau was not keeping tabs on President Kennedy himself [one current rumor] and, second, we show that Director Hoover commendably brought this information to the attention of the proper individuals. Both Director Hoover and the Bureau have been accused of seeking out and storing up "dirt" on prominent persons to use for improper purposes. A logical target of such activities could well have been the President. In this entire episode, however, the Director and the Bureau handled themselves well, with the ultimate result that a connection between organized crime and the President of the United States was snapped, after being uncovered by the Bureau in the course of a perfectly proper investigation. Nothing we can do now will thwart Ms. Exner. The

privacy of the Kennedy family is beyond saving [by no means solely or even largely as the result of the Bureau's release in this case]. I believe that we may as well salvage what we can.

The last area of disagreement concerns the single serial from Director Hoover's "O.C." files. This serial, which is at Tab C, consists of two pages and was not released by the Bureau. One page is a letterhead memorandum from Los Angeles titled with the name of the requester which, like the five serials discussed above, reiterates information contained in documents which have been released to the requester. It reflects her organized crime connections, the "relationship" with Evelyn Lincoln and the "rumor" that Campbell has been intimate with President Kennedy. The other page of the serial is an internal cover memorandum, dated March 20, 1962, which states that the information contained in the letterhead memorandum is being provided by Mr. Evans to Mr. Belmont for the benefit of Director Hoover in light of an impending meeting scheduled between himself and President Kennedy. 3/ The Bureau contends that the letterhead memorandum should not be released for the same reason [that it is duplicative] addressed and rejected above. In this case, moreover, I really don't agree that the "information" it contains has already been made available to Ms. Exner. The "linkage" of the content of the letterhead memorandum with the internal cover memorandum puts the same old facts into a somewhat unique factual perspective. In any event, the statutes deal with "records," not "information." The cover memorandum, according to the Bureau, is outside the scope of this request, or, in the alternative, exempt from mandatory release in its entirety pursuant to exemptions 2 and 7(C). The Bureau's position on "scope," in my judgment, should be rejected out of hand. The cover memorandum relates to the letterhead memorandum and both clearly concern this requester. The exemption 2 argument is

3/ There is no indication in the file whether this meeting actually took place, although other "information" leads one to conclude that it probably did and that they did talk about Ms. Exner.

similarly indefensible. In my mind, a document which furnishes information on a particular individual in the context of that individual being a possible topic of conversation at a proposed meeting between the Director of the F.B.I. and the President of the United States obviously cannot be withheld as relating solely to internal agency practices.

The basic 7(C) argument is slightly more tenable logically, but equally unpersuasive. The Bureau contends, as with the release of the former President's name in the serials discussed above, that the release of the cover memorandum, at least in conjunction with the letterhead memorandum, would constitute an unwarranted invasion of the privacy of the Kennedy family. For the reasons already indicated, I disagree. I recommend that both the cover and letterhead memoranda be released with limited excisions pursuant to exemptions 2 [administrative markings only] and 7(C) [the identity of the private investigator responsible for the rumor]. As with the documents at Tab A, I propose leaving in the names of Messrs. Evans and Belmont. To do so is, in this context, absolutely not an unwarranted invasion of their privacy.

Recommendation

I recommend that you modify the action of Director Kelley as indicated herein. A proposed letter to effect this result is attached.

Quinlan J. Shea, Jr., Chief
Freedom of Information and Privacy Unit

Assistant Attorney General
Civil Division
Attention: Lynne K. Zusman

Assistant Director - Legal Counsel
Federal Bureau of Investigation

JUDITH KATHERINE EXNER
v. FEDERAL BUREAU OF INVESTIGATION
(U.S.D.C., S.D. CALIFORNIA)
CIVIL ACTION NUMBER 76-89-S

1 - [redacted]

Attn: [redacted]

1 - Mr. Mintz

July 13, 1977

1 - [redacted]

b6
b7C

FEDERAL GOVERNMENT

Reference is made to the conversation between
Special Agent [redacted] and Departmental Attorney
Lynne K. Zusman on July 12, 1977, in which she requested
an affidavit in support of defendant's opposition to in
camera inspection.

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b7C

Enclosed for your assistance and information are
the original and five copies of the affidavit of Special
Agent [redacted]

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b7C

Enclosures (6)

NOTE:

Per request of DOJ Attorney, Lynne K. Zusman,
original and five copies of Affidavit of SA [redacted]
Organized Crime Section, Division 6, being forwarded in
support of opposition to in camera inspection.

b6
b7C

EPM: [redacted] (6)

APPROVED: [redacted]

Director _____
Assoc. Dir. _____
Dep. AD Adm. _____
Dep. AD Inv. _____

Adm. Serv. _____
Crim. Inv. _____
Fin. & Pers. _____
Ident. _____
Intell. _____
Laboratory _____

Legal Coun. _____
Plan. & Insp. _____
Rec. Mgnt. _____
Spec. Inv. _____
Tech. Servs. _____
Training _____
Public Affs. Off. _____

2 JUL 22 1977

Assoc. Dir. _____
Dep. AD Adm. _____
Dep. AD Inv. _____
Asst. Dir.:
Adm. Serv. _____
Crim. Inv. _____
Fin. & Pers. _____
Ident. _____
Intell. _____
Laboratory _____
Legal Coun. _____
Plan. & Insp. _____
Rec. Mgnt. _____
Spec. Inv. _____
Tech. Servs. _____
Training _____
Public Affs. Off. _____
Telephone Rm. _____
Director's Sec'y _____

ENCLOSURE

TELETYPE UNIT ☐

b6
b7C

FBI/DOJ

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8 UNITED STATES DISTRICT COURT
9 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
10

11 JUDITH KATHERINE EXNER,

12 Plaintiff

13 v.

Civil Action Number
76-89-S

14 FEDERAL BUREAU OF INVESTIGATION,

15 Defendant

16 AFFIDAVIT

17 I, Gordon G. McNeill, being duly sworn, hereby
18 depose and say as follows:

19 I have been a Special Agent (SA) of the Federal
20 Bureau of Investigation (FBI) for approximately eleven years,
21 and for the past eight years have been involved in
22 investigations in the organized crime field. I am currently
23 assigned to FBI Headquarters (FBIHQ), at Washington, D. C.,
24 as a Supervisor in the Organized Crime Section, specifically

25 // // //

26 // // //

27 // // //

ENCLOSURE

62-116929-22
Enc to AAG
Memo to Civ Div
7/13/77
EPM:dlr

1 that Unit dealing with organized crime in the Western United
2 States. I am thoroughly familiar with the FBI's efforts in this
3 regard including our use of informants, the necessity of main-
4 taining their identities secret and repercussions which could
5 ensue from disclosure of their identities, even inadvertent.

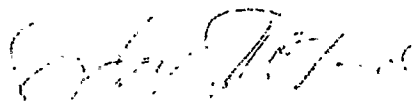
6 As stated in the Affidavit of Special Agent Michael L.
7 Hanigan, dated June 9, 1976, at page six, paragraph seven,
8 "nearly all the documents containing information concerning
9 plaintiff were obtained from an anti-racketeering investigation
10 of John Roselli." Other references to plaintiff were located in
11 files dealing with the broad subject matter of the FBI's criminal
12 intelligence program as it relates to certain FBI Field Offices
13 in California. As previously stated in the Hanigan Affidavit,
14 plaintiff's name appears in a small portion of these documents.
15 These documents are replete with information pertaining to other
16 individuals gathered by high level organized crime informants.
17 Dissemination of the information received from these informants
18 could, in my opinion, place their lives and physical well-being
19 in jeopardy as well as that of their families. Furthermore,
20 disclosure of their identities could severely hinder this
21 Bureau's ability to continue to receive high quality information
22 in this complex area of investigation. These investigations
23 consume years of effort to develop and premature disclosure of
24 some of these sources could affect investigations in progress

25 / / / /

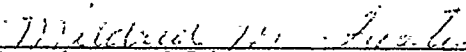
26 / / / /

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1 and compromise the future effectiveness of the sources in
2 gathering quality information in the organized crime area.
3
4

5
6 
7 GORDON G.-MC NEILL
8 Special Agent
9 Federal Bureau of Investigation
10 Washington, D. C.

11 Subscribed and Sworn to before me this 30th day of
12 July, 1977.

13 
14 Notary Public

15 My commission expires _____
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FEDERAL GOVERNMENT

RICHARD C. LEONARD
Attorney at Law
433 North Camden Drive
Suite 1200
Beverly Hills, CA 90210

(213) 278-9750

Attorney for Plaintiff

FILED
ENTERED
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RECEIVED
JUL 21 1977
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JUDITH KATHERINE EXNER,

Plaintiff,

-vs-

FEDERAL BUREAU OF INVESTI-
GATION, et al.,

Defendants.

CIVIL NO. 76-89-S
STIPULATION AND ORDER

IT IS HEREBY STIPULATED AND AGREED, by and between the parties hereto, through their respective attorneys of record, that the Government's Motion for Summary Judgment and plaintiff's Request for In Camera Inspection set for Monday, July 18, 1977, at 10:30 a.m., before the Honorable Edward J. Schwartz, be continued to Monday, August 1, 1977, at the same time and place.

This Stipulation is entered into at the request of counsel for the Government who had important business in Washington which has to be attended to on Monday, July 18, 1977.

DATED: July 15, 1977.


RICHARD C. LEONARD

9 pm-11

1 DATED: July 19, 1977.

2 TERRY J. KNOEPP
3 United States Attorney

4 By /s/
5 CHARLES H. DICK, JR.
6 Assistant U. S. Attorney
7 Attorneys for Defendants

8 O R D E R

9 Good cause appearing, IT IS SO ORDERED.

10 DATED: July 20, 1977.

11
12 EDWARD J. SCHWARTZ
13 UNITED STATES DISTRICT JUDGE
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1 - [redacted] b6
Attn: [redacted] b7C
1 - Mr. Mintz
1 - [redacted]

August 10, 1977

FEDERAL GOVERNMENT

Honorable Edward J. Schwartz
United States District Court
Southern District of California
San Diego, California 92189

Dear Judge Schwartz:

Reference is made to suit captioned
Judith Katherine Exner v. Federal Bureau of Investi-
gation, et al., Civil Action Number 76-89-S.

Enclosed please find a copy of the
Affidavit of Special Agent (SA) [redacted]
Federal Bureau of Investigation (FBI) Headquarters,
Washington, D. C., to be filed August 12, 1977, in
compliance with your order of August 1, 1977, for
in camera inspection.

Department of Justice Attorney Lynne K.
Zusman, has advised that with your permission the FBI
may maintain the in camera documents at our San Diego
Office. These documents will be made available at your
convenience by Special Agent in Charge Ronald L. Maley,
or his assistant, John C. McGinley, at 231-1122.

Assoc. Dir. _____
Dep. AD Adm. _____
Dep. AD Inv. _____
Asst. Dir.:
Adm. Serv. _____
Crim. Inv. _____
Fin. & Pers. _____
Ident. _____
Intell. _____
Laboratory _____
Legal Coun. _____
Plan. & Insp. _____
Rec. Mgnt. _____
Spec. Inv. _____
Tech. Servs. _____
Training _____
Public Affs. Off. _____
Telephone Rm. _____
Director's Sec'y _____

EPM: [redacted]

(SEE NOTE, PAGE 2)

TELETYPE UNIT ☐

FBI/DOJ

Honorable Edward J. Schwartz

SA [redacted] Legal Counsel Division,
FBI Headquarters, may be contacted at PPS number
324-4522, if you desire any further assistance.

b6
b7C

Sincerely yours,

John A. Mintz
Assistant Director - Legal Counsel

Enclosure

- 1 - Richard C. Leonard, Esq.
Attorney at Law
433 North Camden Drive
Suite 1200
Beverly Hills, California 90210
- 1 - Assistant Attorney General (Encls. 2)
Civil Division
Attention: Lynne K. Zusman
- 1 - United States Attorney (Enc.)
Southern District of California
Attention: Charles H. Dick, Jr.
Assistant United States Attorney

NOTE:

Per instructions from DOJ Attorney Lynne K.
Zusman, copy of Affidavit of SA [redacted] transmitted
herewith.

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b7C

APPROVED:

Director _____
Assoc. Dir. _____
Dep. AD Adm. _____
Dep. AD Inv. _____

Adm. Serv. _____
Crim. Inv. _____
Ident. & Rec. _____
Ident. _____
Intell. _____
Laboratory _____

Legal Coun. _____
Plan. & Insp. _____
Rec. Mgmt. _____
Spec. Inv. _____
Tech. Serv. _____
Training _____
Public Affs. Off. _____

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8 UNITED STATES DISTRICT COURT
9 FOR THE SOUTHERN DISTRICT OF CALIFORNIA
10

11 JUDITH KATHERINE EXNER,

12 Plaintiff

Civil Action Number
76-89-SA

13 v.

14 FEDERAL BUREAU OF INVESTIGATION, et al.

15 Defendants

16 AFFIDAVIT

17 I, Marvin Lewis, being duly sworn, depose and
18 say as follows:

19 (1) I am a Special Agent of the Federal Bureau
20 of Investigation (FBI), assigned in a supervisory capacity
21 to the Freedom of Information - Privacy Acts (FOIPA) Branch
22 of the FBI, Washington, D. C.

23 (2) Pursuant to the Court's Order of August 1,
24 1977, I have prepared documents responsive to plaintiff's
25 FOIPA request for the Court's in camera inspection. These
26

ENCLOSURE

02-116929-14

*Encl. to court
APG:aa
SPM:aa
8/10/77*

1 have been previously described in Exhibit A to Second Affidavit
2 of Michael L. Hanigan, dated June 9, 1976 (hereinafter
3 Second Hanigan Affidavit).

4 (3) As explained in the Second Hanigan Affidavit,
5 documents containing information identifiable with the plaintiff
6 were scattered through volumes of materials concerning the
7 investigation of others. The full document in which plaintiff's
8 name appears is being submitted. The in camera documents have
9 been assembled on "file backs" and in the order described in
10 the Second Hanigan Affidavit. An index sheet has been attached
11 to each package, and each package is lettered sequentially.
12 This sheet also sets forth the page number in the Exhibit to the
13 Second Hanigan Affidavit where the document has been previously
14 described and the pages in the document which are pertinent
15 to plaintiff's request.

16 (4) Plaintiff's counsel has been advised that
17 additional administrative material previously withheld would now
18 be released pursuant to a change in Department of Justice policy
19 regarding instances in which the exemption allowed by Title 5,
20 United States Code, Section 552 (b)(2) is asserted. Routing
21 blocks and routing stamps have been released pursuant to this
22 change. File numbers previously withheld only for convenience
23 of processing have also been released. Exemption (b)(2), in
24 conjunction with (b)(7)(D), will continue to be asserted to
25 withhold informant symbol numbers. These numbers represent the
26 internal FBI practice utilized to protect the identity of

1 sources from unauthorized disclosure. They play an integral
2 part in affording maximum security to FBI informants. Release
3 would cause a breakdown in the security system and could assist
4 in the actual identity of the sources.

5 (5) A close review of all documents in preparation
6 for this in camera review has revealed several instances where
7 plaintiff's name appears on a page of a document which was
8 heretofore not considered for release. This oversight was due,
9 in most instances, to the fact that the initial processing of
10 these documents had overlooked an index at the very end of
11 several FBI reports and had instead relied only on the table of
12 contents at the beginning of these reports as the guide in
13 locating the specific pages within the document which contained
14 information pertaining to the plaintiff. These additional
15 references to the plaintiff have now been processed pursuant to
16 the Freedom of Information Act (FOIA). Several additional
17 "administrative" or "cover pages" and synopses of FBI reports
18 which contain a reference to or mention of the plaintiff's name,
19 have also been processed for release. In one instance, a docu-
20 ment was withheld which contained substantially the same
21 information as another which was released in part. The former
22 has now been released to plaintiff consistent with the release
23 of the latter.

24 (6) The aforementioned changes and corrections set
25 forth in paragraphs four and five, supra., are included in
26 the documents available to the Court for in camera inspection
27

1 hereof as Exhibit A.)

2 (7) Those portions of the documents for which no
3 exemption is claimed have been marked through with a yellow
4 highlighter. This is the material which has now been released
5 pursuant to plaintiff's FOIPA request, administrative appeal and
6 the current in camera review. Exemptions allowed by the FOIA
7 have been noted in the margin. The notation "OSR," indicates
8 that the paragraph is "outside the scope" of plaintiff's
9 request and appears only on those pages listed on the index
10 sheet.

11
12
13
14 Marvin Lewis
15 MARVIN LEWIS
16 Special Agent
17 Federal Bureau of Investigation
18 Washington, D. C.

19 Subscribed and Sworn to before me this 10th day of
20 August, 1977.

21 Sharon Fulton
22 Notary Public

23 My commission expires October 31, 1980
24
25
26
27

August 10, 1977

Richard C. Leonard, Esq.
Suite 1200
433 North Camden Drive
Beverly Hills, California 90210

Dear Mr. Leonard:

Reference is made to the Freedom of Information-Privacy Acts request of your client, Judith Campbell Exner, and subsequent litigation.

Please be advised that an examination of the documents within our central records in preparation for the court ordered in camera review has revealed several instances where your client's name appears on a page of a document which was heretofore not considered for release. This oversight was due, in most instances, to the fact that the initial processing of these documents had overlooked an index at the very end of several FBI reports and had instead relied only on the table of contents at the beginning of these reports as the guide in locating the specific pages within the document which contained information pertaining to your client. These additional references to her name have now been processed pursuant to the Freedom of Information Act (FOIA). Several additional "administrative" or "cover pages" and synopses of FBI reports which contain a reference to or mention of her name, have also been processed for release. In one instance, a document was withheld which contained substantially the same information as another document previously released. The former is now being released consistent with the release of the latter.

In conversation with Ms. Lynne K. Zusman of the Department of Justice, you expressed the desire of your client to have FBI records relative to Ms. Exner reprocessed for the release of any administrative material no longer exempt under Title 5, United States Code, Section 552 (b) (2). Those records consisting of 29 pages containing excisions wherein exemption (b) (2) was cited have now been reprocessed and are enclosed.

Exhibit A ENCLOSURE

Richard C. Leonard, Esq.

An additional 73 pages of new material from our records are also enclosed. Please note that the majority of these pages are from the Table of Contents or Index as mentioned above and contain no substantive information concerning your client.

Sincerely yours,

Clarence M. Kelley
Clarence M. Kelley
Director

Enclosures (61)

airtel

1 - [redacted]
Attn: [redacted]
1 - Mr. Mintz
1 - [redacted]

b6
b7C

8/11/77

To: SAC, San Diego (66-1761)

FEDERAL GOVERNMENT

Via Federal Express

From: Director, FBI

JUDITH KATHERINE EXNER
v. FEDERAL BUREAU OF INVESTIGATION, et al.
(U.S.D.C., S.D. CALIFORNIA)
CIVIL ACTION NUMBER 76-89-S

Enclosed are the original and three copies of a letter from Assistant Director John A. Mintz, Legal Counsel Division, to United States District Court Judge Edward J. Schwartz, dated 8/10/77; the original and four copies of the Affidavit of SA [redacted] and one set of documents relating to plaintiff's FOI-PA request.

b6
b7C

Plaintiff instituted captioned litigation to obtain documents pertaining to herself under the FOI-PA. On 8/1/77, Judge Schwartz ordered the defendants to produce documents pertaining to this litigation for his in camera inspection by 8/12/77.

On 8/5/77, Departmental Attorney Lynne K. Zusman advised that she contacted the law clerk to Judge Schwartz regarding the maintenance of these documents in the San Diego Field Office. As a result of these conversations, Ms. Zusman advised that the Court had no objection to the San Diego Office maintaining the documents provided that they would be made available to him at his convenience.

San Diego insure that original and three copies of enclosed affidavit are hand delivered to AUSA Charles H. Dick, Jr., for his filing and service on plaintiff no later than 8/12/77. Further, insure hand delivery of original and one copy of letter to Judge Schwartz from Assistant Director [redacted] (Copies of this letter being mailed from Headquarters.)

Enclosures (10)

EPM:dlr (6)

NOTE:

ENCLOSURE

Original and four copies of Affidavit of SA [redacted] and in camera documents being forwarded to San Diego Office. On 8/1/77, Court ordered in camera inspection of documents. After conversations with law clerk to Judge Schwartz, DOJ Attorney Lynne K. Zusman advised that would be permissible for FBI to maintain documents at San Diego Office. SA [redacted] San Diego, advised of arrangements made with Court.

By Federal Express 8-11-77

b6
b7C

FBI/DOJ

Legal Coun. [redacted]
Plan. & Insp. [redacted]
Rec. Mgnt. [redacted]
Spec. Inv. [redacted]
Tech. Servs. [redacted]
Training [redacted]
Public Affs. Off. [redacted]
Adm. Serv. [redacted]
Crim. Inv. [redacted]
Fin. & Pers. [redacted]
Ident. [redacted]
Intell. [redacted]
Laboratory [redacted]
Director [redacted]
Assoc. Dir. [redacted]
Dep. AD Adm. [redacted]
Dep. AD Inv. [redacted]
Asst. Dir.: [redacted]
Adm. Serv. [redacted]
Crim. Inv. [redacted]
Fin. & Pers. [redacted]
Ident. [redacted]
Intell. [redacted]
Laboratory [redacted]
Legal Coun. [redacted]
Plan. & Insp. [redacted]
Rec. Mgnt. [redacted]
Spec. Inv. [redacted]
Tech. Servs. [redacted]
Training [redacted]
Public Affs. Off. [redacted]
Telephone Rm. [redacted]
Director's Sec'y [redacted]

APPROVED

ST 104-36 62-116929-25

B. e. Rm

Filed

8-18-77

1 RICHARD C. LEONARD
2 Attorney at Law
3 433 North Camden Drive
4 Suite 1200
5 Beverly Hills, CA 90210
6
7 (213) 278-9750

8 Attorney for Plaintiff

9 UNITED STATES DISTRICT COURT
10 SOUTHERN DISTRICT OF CALIFORNIA

11 JUDITH KATHERINE EXNER,

12 Plaintiff,

13 -vs-

14 FEDERAL BUREAU OF INVESTI-
15 GATION, et al.,

16 Defendants.

CIVIL NO. 76-89-S

ORDER

FEDERAL BUREAU OF INVESTIGATION

17 On August 1, 1977, at 10:30 a.m., Defendants' Motion
18 to Dismiss or, in the Alternative, for Summary Judgment and
19 Plaintiff's Request for In Camera Review came on for hearing
20 before the Honorable Edward J. Schwartz. Following oral argument,
21 and the Court's consideration of all Points and Authorities filed
22 in support and in opposition to the Motion, and review of the file,
23 it is hereby ORDERED as follows:

NOT RECORDED
14 AUG 31 1977

24 Plaintiff's Motion for In Camera Inspection of all of
25 the Federal Bureau of Investigation documents relating to
26 Plaintiff, Judith Katherine Exner, is granted; and it is further
27 ORDERED that the Defendants shall make available to the
28 Court all of the aforesaid documents on or before Friday, August 12,

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b7C

3648

54 SEP 7 1977

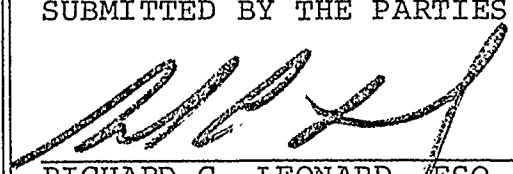
1 1977, for purposes of the Court's in camera inspection.

2 IT IS FURTHER ORDERED, that the Pretrial Conference
3 previously set to be held on September 12, 1977, be continued
4 until Monday, November 14, 1977, at 10:30 a.m. before the
5 Honorable Edward J. Schwartz.

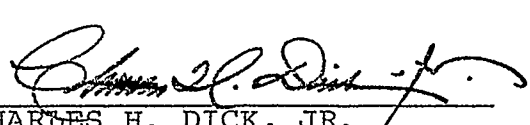
6
7 Dated: 8-18-77

8
9 /s/ Edward J. Schwartz
10 United States District Judge

11 SUBMITTED BY THE PARTIES:

12 
13 _____
14 RICHARD C. LEONARD, ESQ.
15 433 North Camden Drive
16 Suite 1200
17 Beverly Hills, CA 90210
18 (213) 278-9750
19 Attorney for Plaintiff

20 LYNNE K. ZUSMAN
21 Attorney, U.S. Department of Justice

22 By: 
23 _____
24 CHARLES H. DICK, JR.
25 Assistant U.S. Attorney
26
27
28

1 TERRY J. KNOEPP
United States Attorney

2 CHARLES H. DICK, JR.
3 Assistant United States Attorney

4 United States Courthouse
5 940 Front Street, Room 5-N-19
San Diego, California 92189
6 Telephone: 895-5610

7 Attorneys for Defendants.

FILED
ENTERED
LODGED
RECEIVED
JUL 29 1977
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

8
9 UNITED STATES DISTRICT COURT
10 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

11
12 JUDITH KATHERINE EXNER,

13 Plaintiff,

14 v.

15 FEDERAL BUREAU OF
16 INVESTIGATION, et al.

17 Defendants.

FEDERAL GOVERNMENT

CIVIL ACTION NO. 76-89-SA

DEFENDANTS' REPLY BRIEF

18
19 Plaintiff filed this suit under the Freedom of
20 Information Act (FOIA), 5 U.S.C. 552 and the Privacy Act,
21 5 U.S.C. 552a, seeking access to records maintained by
22 the Federal Bureau of Investigation. After defendants' ⁶²⁻¹¹⁶⁹²⁹⁻²⁷
23 motions to stay judicial proceedings pending completion ^{NOT RECORDED}
24 of agency review of the documents were denied, the ^{14 AUG 31 1977}
25 documents were processed and released to plaintiff except
26 for portions of documents withheld to protect the privacy
27 of third parties and confidential information, the disclosure
28 of which would reveal a confidential source, pursuant to
29 5 U.S.C. 552(b)(7)(C) and (7)(D). Defendants also withheld,
30 under 5 U.S.C. 552 (b)(7)(F) information from one document
31 which would endanger the life or physical safety of law
32 enforcement personnel. Material from two documents was

1 withheld as agency deliberative material protected by
2 5 U.S.C. 552(b)(5). Deletions were made on the basis of
3 5 U.S.C. 552(b)(2). Due to a recent determination by the
4 Deputy Attorney General, that this exemption should no
5 longer be invoked to withhold administrative or routine
6 markings, and other such material, the documents which
7 contain deletions made on this basis are currently being re-
8 processed to eliminate the deletions and therefore to disclose
9 additional material.

10 Defendants moved to dismiss, or in the alternative, for
11 summary judgment and respectfully referred the Court to the
12 Second Affidavit of Michael L. Hanigan and the memorandum in
13 support of the motion. Plaintiff opposed defendants' motion
14 and requested in camera inspection of FBI documents. Defendants
15 now reply to plaintiff's papers and rely on the affidavit
16 and memorandum earlier filed as well as the affidavit of
17 Gordon G. McNeill, Special Agent of the Federal Bureau of
18 Investigation, dated July 13, 1977.

19 Defendants' motion should be granted for the reasons
20 set forth in their prior memorandum since the contentions
21 set forth in plaintiff's papers do not detract from or rebut
22 the showing made by defendants that the defense motion
23 should be granted. Defendants have shown that the material
24 at issue has been properly withheld under the Freedom of
25 Information Act and the Privacy Act..

26 DISCUSSION

27 The Court is wholly justified in granting defendants'
28 motion on the basis of the record now before it. In addition
29 to the affidavits earlier filed, defendants have recently
30 filed the McNeill affidavit. Mr. McNeill, a Supervisor in
31 the Organized Crime Section of the Federal Bureau of
32 Investigation, is assigned to the unit dealing with

1 organized crime in the Western United States. McNeill
2 re-iterates Special Agent Hanigan's statement that nearly
3 all the documents containing information concerning plain-
4 tiff were obtained from an anti-racketeering investigation
5 of John Roselli. McNeill further states that other references
6 to plaintiff were located in files dealing with the broad
7 subject matter of the FBI's Criminal Intelligence Program
8 as it relates to certain FBI Field Offices in California
9 and that plaintiff's name appears in but a small portion
10 of these files. These documents are replete with infor-
11 mation pertaining to other individuals gathered by high
12 level organized crime informants. Dissimination of the
13 information received from these informants could place
14 their lives and physical well-being in jeopardy as well
15 as that of their families. (McNeill Affidavit, page 2).

16 Furthermore, disclosure of these identities could
17 severely hinder the FBI's ability to continue to receive
18 high quality information in this complex area of investiga-
19 tion. These investigations consume years of effort to
20 develop and premature disclosure of some of these sources
21 could affect investigations in progress and compromise the
22 future effectiveness of the sources in gathering quality
23 information in the Organized Crime area. (McNeill Affidavit,
24 pages 2 and 3).

25 The legislative history of the 1974 Amendments to the
26 Freedom of Information Act makes it clear that while in
27 camera inspection is an option available to the Court in
28 Freedom of Information Act cases, it should be used
29 sparingly and only because of a critical gap in the public
30 record, presently before the Court.

31 Before the Court orders in camera inspection the "govern-
32 ment should be given the opportunity to establish by means of

1 testimony or detailed affidavits that the documents are clearly
2 exempt from disclosure." H.R. Rep. No. 93-1380, Conference
3 Rep. 93d Cong., 2s Sess. 9 (1974); S. Rep. No. 93-854,
4 93d Cong., 1d Sess. 15 (1974). This legislative statement
5 was relied on once again in the recent decision of the
6 Court of Appeals for the District of Columbia, Weissman
7 v. CIA, No. 76-1566 (D.C. Cir., January 6, 1977; April 4,
8 1977) (slip opinion attached). In that opinion the Court
9 noted:

10 "We adopted this view in Vaughn v. Rosen,
11 which specified that where the public
12 record is sufficient to permit a legal
13 ruling, the inquiry need go no further,
14 157 U.S. App. D.C. 340, 484 F.2d 820,
15 824 (1973) . . .

16 The reluctance of Congress and the courts
17 to require in camera inspection is well
18 founded. In camera inspections are bur-
19 densome and are conducted without the
20 benefit of an adversary proceeding.
21 Vaughn, supra, at 824. A denial of con-
22 frontation creates suspicions of unfairness
23 and is inconsistent with our traditions."
24 (Weissman, supra, pp. 10-11)

25 The importance of endorsing this approach to in camera
26 review was underscored by the Court's appreciation of the
27 true intent of Congress in this regard as well as by prac-
28 tical realities. As the Court so wisely stated it:

29 "In every FOIA case, there exists the
30 possibility the Government affidavits
31 claiming exemptions will be untruthful.
32 Likewise, in every FOIA case, it is
possible that some bits of non-exempt
material may be found among exempt
material, even after a thorough agency
evaluation. . . .

33 If, as appellant argues, these possibilities
are enough automatically to trigger an in
camera investigation, one will be required
in every FOIA case. This is clearly not
what Congress intended, nor what this
Court has found to be necessary." (Emphasis
added.)
(Weissman, supra, p. 11.) 1/

1/ See Ftn. 11 of Weissman opinion attached.

1 In a recent decision involving claims by the
2 Department of HEW that inter-agency memoranda were exempted
3 documents under 5 U.S.C. §552(b)(5) the Court rejected
4 plaintiff's urging that in camera inspection was required
5 on the presumption that "Courts are to be trusted to be
6 impartial and that a third-party review by a Court is
7 more comforting than review by representatives of the
8 agency resisting disclosure." Morton-Norwich Products,
9 Inc. v. Mathews, 415 F. Supp. 78, 82 (D. D.C. 1976).
10 The Court characterized this attitude as "superficially
11 enticing if one overlooks the experience of history
12 that indicates how arbitrary judges as well as others
13 in authority become if they conduct their business in
14 secrecy." Ibid. The Court upheld the integrity of the
15 administrative process thusly:

16 "First, if the Government wished
17 wrongfully to withhold, it need not
18 have ever indicated that the documents
19 existed in the first place. Second,
20 sanctions now exist under the amended
21 act against those who improperly con-
22 ceal, 5 U.S.C. §552(a)(4)(f). The
23 FDA processes thousands of Freedom
24 of Information Act requests a year.
25 It has a specialized staff which
26 proceeds with legal advice. The U.S.
27 Attorney in contested cases reviews
28 that advice. There is nothing in
29 this case to suggest that the agency
30 has not been forthright or responsive.
31 The Freedom of Information Act must
32 proceed in an atmosphere of confidence
in government. If the agency cannot
be trusted, the Act will never work.
It is a profound mistake to transfer
administrative responsibility to judges
on the theory that persons employed
by the Executive Branch are not honest
or lack judgment. The effort to do
this through the in camera process is
misplaced." (Morton-Norwich, supra,
pp. 82-83.)

33 The necessity for the Court to give credence to the
34 representations of government agency officials is well


1 established. In another recent opinion, the U.S. District
2 Court for the District of Columbia refused plaintiff's plea
3 for in camera review of Federal Trade Commission internal
4 documents under 5 U.S.C. §552(b)(5). Bristol-Myers v. FTC,
5 Civil Action No. 76-1364 (D.C. December 28, 1976) (Slip
6 opinion attached). Even as to the possibility of identifying
7 non-exempt segregable material, the Court stated:

8 "In view of the evident substantial
9 and good faith compliance with the
10 requirements of the law insofar as
11 the other disputed documents are
12 concerned, the Court will take the
Commission at its word and not re-
quire in camera inspection." Ibid.
(See also Wellford v. Hardin, 330
F. Supp. 915 (D. Md. 1971).

13 Because of the sensitivity of these files as part
14 of the Government's investigation of organized crime
15 activities, their protection is especially important.
16 Plaintiff's claim that defendants' withholding is unjustified
17 because segments of some of the eighty-six documents released
18 partially to the plaintiff have not been released, ignore the
19 description defendants have made of the files where plaintiff's
20 name appears. It is clear from the record that plaintiff's
21 name merely appears peripherally in files largely unrelated
22 to her, i.e., files dealing with other individuals and
23 activities in which she was not involved. Wherever her name
24 appears, the material has been processed as responsive to
25 the request for information about herself. However, where
26 the material reveals the names of other individuals, other
27 than Roselli and Sam Giancana, it has been withheld to
28 protect the third party's identity. Where the material
29 reveals a confidential source or confidential information
30 furnished only by a confidential source, or would cause
31 damage to law enforcement personnel, it has been withheld.
32 The statute amply supports the Government's withholding of

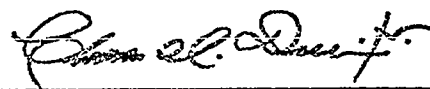
documents for these reasons. Defendants have fully established the need for confidentiality of those portions of these investigative files which have not been released.

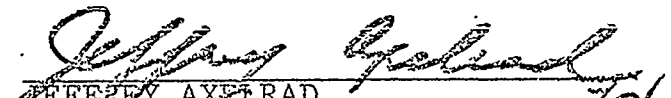
Respectfully submitted,


BARBARA ALLEN BABCOCK
Assistant Attorney General *27*

TERRY J. KNOEPP
United States Attorney

By:


CHARLES H. DICK, JR.
Assistant United States Attorney


JEFFREY AXELRAD *27*


LYNNE K. ZUSMAN

Attorneys, Department of Justice
Washington, D. C. 20530
Telephone: (202) 739-4544

Attorneys for Defendants.

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FILED

DEC 23 1976

JAMES F. DAVEY, Clerk
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRISTOL-MYERS COMPANY,)	
)	
Plaintiff)	
)	Civil Action
v)	
)	No. 76-1364
Federal Trade Commission,)	
)	
Defendant)	

O P I N I O N

Plaintiff in this case is Bristol-Myers Company, the maker of three non-prescription internal analgesics -- Bufferin, Excedrin and Excedrin P.M. Bristol-Myers is presently defending a Federal Trade Commission complaint (FTC Docket No. 8917) alleging false advertising of these products. The Commission is also carrying on adjudicative proceedings in two companion cases, American Home Products, et al., and Sterling Drug, Inc. et al.

As part of its discovery in Docket No. 8917, Bristol-Myers applied for the issuance of one subpoena duces tecum and three subpoenas duces tecum et ad testificandum, all of which were directed to the FTC or its employees. However, on May 30, 1976, the administrative law judge handling the case denied access to a substantial portion of the documents sought. On May 6, 1976, Bruce Hafner, counsel for Bristol-Myers, served a Freedom of Information Act request on the Commission for most of the documents pertinent to the complaint proceeding. On May 10th, the request was modified, excluding any document already in the possession of Bristol-Myers.

In response to this request, the Commission has

31,742 pages.^{1/} It withheld, however, 1,300 documents (3,000 pages). Some of these documents are the subject of this litigation, which is before the Court on the Commission's Motion to Dismiss, and Cross-Motions for Summary Judgment.

In its Motion to Dismiss, or in the alternative, for Summary Judgment, the government submitted an index of the withheld documents. See Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). They were divided into nine discrete categories:

CATEGORY A. Intra-agency memoranda

CATEGORY B. 100 "Blue Minutes", i.e. reflections of the Commission's deliberations

CATEGORY C. Documents from Commissioners

CATEGORY D. Interview reports (of expert witnesses)

CATEGORY E. Correspondence between staff and consultants

CATEGORY F. One letter discussing a witness' dissatisfaction with his compensation

CATEGORY G. Drafts and comments (of proposed rules, notice orders and complaints)

CATEGORY H. Staff written reports of interviews by counsel

CATEGORY I. Memoranda from files of U. S. Pharmacopeial Convention

After examining the index, Bristol-Myers withdrew its request as to many of the documents. Others have

1. By affidavit, the senior FTC attorney assigned to this case states that he has spent more than 374 hours in search of the requested documents.

been supplied to them through normal discovery channels. The remaining papers^{2/} are being withheld by the Commission under Exemptions 5^{3/} and 7A^{4/} to the Act's production rules. The Court finds the exemptions applicable. Accordingly, the Commission's Motion for Summary Judgment will be granted.

Category A. According to the index, the majority of the letters listed in this category are to the Commission from heads of one of the agency's divisions or bureaus. Others are inter-departmental. These letters and memos consist of recommendations and opinions pertaining to various aspects of the enforcement proceeding. Manifestly, the documents are not investigatory.^{5/} Consequently, exemption 7A is inapplicable. However, they are free from disclosure under the fifth exemption^{6/} Retail Credit Co. v.

2/ The documents still disputed are: Category A--(a)(3), (a)(5), (a)(7)-(8), (b)(9), (b)(13)-(14), (b)(15)-(17), (b)(19)-(25), (b)(27); Category B; Category C--(a)(1), (a)(4), (b); Category D--(a) and (b) [factual portions only], (c); Category E--(a)(7), (a)(11)-(12); Category G--(a), (b), and (e); Category H. This amounts to 327 documents (765 pages).

3/ Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. §552(b)(5).

4/ Exemption 7A protects "investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would interfere with enforcement proceedings." 5 U.S.C. §552(b)(7)(A).

5/ The Commission index repeatedly invokes Exemption 7A in situations in which the exemption is not even arguably available.

6/ Citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975), Bristol-Myers has argued that certain documents in Categories A, B, C, and G are "final opinions...made in the adjudication of cases" and therefore must be disclosed. See 5 U.S.C. §552(a)(2)(A). However, as counsel for Bristol-Myers acknowledged at oral argument on these motions, the operations of the NLRB are sui generis. Justice White's opinion in Sears carefully confined the holding there to the unique structure of the Labor Board. Therefore, Sears will not be invoked here.

FTC, 1976-1 Trade Cases ¶60,727 (D.D.C. 1976).

Category B. These are the "blue minutes." They too fall under Exemption 5. Ash Grove Cement Co. v. FTC, 511 F.2d 815, 835 (D.C. Cir. 1975).

Category C. The four memoranda to the Commission in subsection (a) of this category are from various Commissioners. Discussed are such matters as the weaknesses of the case, proposed revisions in the complaint, and the relative merits of proceeding by complaint, as opposed to rulemaking. None of these documents need be produced. See Retail Credit Co. v. FTC, supra, at pp.68, 129-68, 130.

The items in subsection (b) to Category C are described as "over 50 Circulations and Routing Slips from from Commissioners containing theories, strategies, reflections or plans to take action." Exemption 5 applies here as well. Id. at p.68, 127.

Category D. Those papers in subsections (a) and (b) of this category are described as interviews, conversations and discussions with expert consultants. Plaintiff seeks only the factual portions of these documents. Essentially, the Commission takes the position that the factual material in these papers is not "in a form that is severable without compromising the private remainder of the documents." EPA v. Mink, 410 U.S. 73, 89 (1972); see Montrose Chemical Corporation v. Train, 491 F.2d 63 (D.C. Cir. 1972); Washington Research Project, Inc. v. Department of Health, Education and Welfare, 504 F.2d 238 (D.C. Cir. 1974). In view of the evident substantial and good faith compliance with the requirements of the law insofar as the other disputed documents are concerned, the Court will take the

Commission at its word and not require in camera inspection.

Subsection (c) of the category is described as "reports of visits and conversations with expert consultants who are included on the witness list." Basically, these documents reflect discussions of trial strategy. The Court finds these exempt under both Exemptions 5 and 7A. See Title Guarantee Co. v. NLRB, 534 F.2d 484 (2d Cir. 1976). Climax Molybdenum Co. v. NLRB, 539 F.2d 63 (10th Cir. 1976). See also Soucie v. David, 448 F.2d 1067, 1078 (D.C. Cir. 1971); Wu v. National Endowment for the Humanities, 460 F.2d 1030, 1032 (5th Cir. 1972).

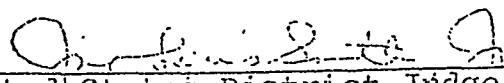
Category E. Plaintiff seeks only three letters in this category. All are letters from complaint counsel to various experts. These are free from disclosure under Exemption 5. See EPA v. Mink, supra; Hickman v. Taylor, 329 U.S. 495 (1947).

Category G. This category consists of drafts of the complaint issued against Bristol-Myers and a draft of a "Notice of Formulation of Proposed Trade Regulation Rule Relating to Advertising of Analgesics and an attached memorandum." These documents fully reflect the deliberative processes and attorney work-product of the Commission and, therefore, are covered by Exemption 5. See Retail Credit Co. v. FTC, supra at pp.68, 126-68, 127.

Category H. This final category is composed of the notes, taken by Commission attorneys, of interviews taken in connection with the companion case, American Home Products, et al., of two experts. The interviews were conducted by counsel for American Home Products. The Commission contends that both sets of notes are exempt under section (b)(5) and (b)(7)(A).

- 6 -

While the Commission has failed to sustain its burden of showing both that these documents are investigatory records and that their production would interfere with its enforcement proceedings, the Court is satisfied that they are the work-product of the Commission's attorneys, and therefore free from disclosure under the fifth exemption.


United States District Judge

Dated: December 23rd, 1976

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FILED

DEC 23 1976

JAMES F. DAVEY, Clerk
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRISTOL-MYERS COMPANY)

Plaintiff)

v.)

FEDERAL TRADE COMMISSION)

Defendant)

Civil Action
No. 76-1364

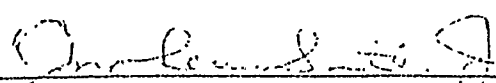
ORDER

Upon consideration of Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment, Plaintiff's Motion for Summary Judgment, Points and Authorities in support thereof, and Oppositions thereto, and after oral argument by counsel, it is by the Court this 23d day of December, 1976

ORDERED that Plaintiff's Motion for Summary Judgment be, and the same hereby is, denied; and it is further

ORDERED that Defendant's Motion to Dismiss be, and the same hereby is, denied; and it is further

ORDERED that Defendant's Motion for Summary Judgment be, and the same hereby is, granted.


UNITED STATES DISTRICT JUDGE

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1566

GARY A. WEISSMAN, PLAINTIFF-APPELLANT

v.

CENTRAL INTELLIGENCE AGENCY, ET AL.,
DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 75-1583)

Argued November 24, 1976

Decided January 6, 1977

Mark H. Lynch, with whom *Larry P. Ellsworth* and *Allan B. Morrison*, were on the brief for appellant.

Frank A. Rosenfeld, Attorney, Department of Justice, of the bar of the Supreme Court of Pennsylvania, *pro hac vice*, by special leave of court, with whom *Rex E. Lee*, Assistant Attorney General, *Earl J. Silbert*, United States Attorney and *Leonard Schaitman*, Attorney, Department of Justice, were on the brief for appellees.

Michael H. Stein, Attorney, Department of Justice, also entered an appearance for appellees.

Before: MCGOWAN and TAMM, *Circuit Judges* and GESELL, *United States District Judge* for the United States District Court for the District of Columbia

Opinion for the Court filed by *District Judge* GESELL.

GESELL, *District Judge*: This is an appeal arising under the Freedom of Information Act, 5 U.S.C. §§ 552 et seq. Appellant Weissman challenges an order of the District Court granting summary judgment in favor of the Central Intelligence Agency which refused to turn over certain documentary material to Weissman claiming that disclosure was not required because of three exemptions found in § 552(b) of the Act. The appeal focuses on the scope of these statutory exemptions as well as upon the procedures by which the availability of such FOIA exemptions is to be determined at the trial court level.

In February, 1975, Weissman wrote the CIA expressing his alarm at news stories suggesting that investigative activities of the Agency had been directed against left-of-center political activists. Stating that he had been active in political reform during the 1960's, he requested "to see all files completed on me by the CIA." The CIA

* Sitting by designation pursuant to 28 U.S.C. § 292(a).

* Appellees sought by tardy motion to have this appeal dismissed. The trial judge originally made a brief oral ruling and later, at defendants-appellees' request, particularized his findings of fact and conclusions of law, document-by-document, issued in conformity with *Schwartz v. IRS*, 167 U.S. App. D.C. 301, 511 F.2d 1303 (1975). Under all the circumstances the trial judge did not abuse his discretion in granting plaintiff-appellant's unopposed motion for extension. See Fed. R. Civ. P. 52(b); Fed. R. App. P. 4(a)(2). *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962). The motion to dismiss is without merit.

advised that "Unbeknown to Mr. Weissman he was considered for employment by this agency in the 1950's" A substantial amount of documentary material was thereafter released to Weissman. These papers disclosed that from 1958 to 1963 Weissman, without his knowledge or permission, was under a periodic but continuing investigation by the Agency for potential use as a witting agent to provide information about foreign activities in which he might participate, such as the VII Youth Festival held in Vienna in 1959. Detailed background checks were made, and provisional followed by final covert security approvals were granted. Although deemed qualified for undercover assignment, Weissman was never approached and he did not at any time seek employment with the Agency.

All or part of over 50 documents developed by the CIA during its investigation were withheld. Since much of this material gathered by the Agency was classified as confidential, contained information concerning agents' names, sources and procedures, or was considered part of an investigation compiled for law-enforcement purposes, the Agency in particularizing each document withheld claimed exemption under 5 U.S.C. § 552(b)(1), (3) or (7). After Weissman brought suit to compel disclosure, the Agency moved for summary judgment. Upon hearing the motion and considering the supporting affidavits, the District Court accepted the Agency's position. This appeal followed.

When Congress enacted the FOIA it recognized the obvious difficulties that would inevitably arise when disclosure was sought of documents touching on sensitive matters affecting law enforcement and national security. The Act, however, gave only general guidance in seeking to protect material of this type, and it has been left to the courts to develop standards and procedures in the light of experience with this delicate area.

The exemptions claimed in this instance, as set forth at 5 U.S.C. § 552(b), remove from the disclosure obligations of the FOIA matters that are

(b)(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of the national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(b)(3) Specifically exempted from disclosure by statute;

(b)(7) investigatory records compiled for law enforcement purposes . . . [subject to some conditions].

I. EXEMPTION UNDER 5 U.S.C. § 552(b) (3)

In this instance, the Agency placed principal reliance on exemption (b)(3).² The Central Intelligence Act of 1949 provided at 50 U.S.C. § 403g that "the organization, functions, names, official titles, salaries or numbers of personnel employed by the Agency" shall be protected from disclosure. In addition, Section 403(d) (3) of this Title provides, "That the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." The directive that the CIA protect its sources is especially broad protecting not only the name of the source but, to the extent the Agency considers reasonable to protect the source, the nature and type of information supplied. While appellant vigorously asserts that § 403(d) (3) is not a statute within the exemption, the legislative history clearly demonstrates³ that both § 403(d) (3) and § 403

² This exemption has been modified effective March, 1977, but the Court is concerned here only with the present statutory language.

³ The Conference Report on the 1974 Amendments to the FOIA notes, "... intelligence sources and methods (50 U.S.C. § 403(d) (3) and (g)), for example, may be classified and exempted under section 552(b) (3) of the Freedom of Infor-

(g) are precisely the type of statutes comprehended by exemption (b) (3). Appellant's contention, moreover, has now been rejected. *Phillippi v. Central Intelligence Agency*, No. 76-1004 (D.C. Cir., Nov. 16, 1976), n. 14.

II. EXEMPTION UNDER 5 U.S.C. § 552(b) (7)

The Agency also withheld material pursuant to exemption (b) (7) which shields from disclosure certain records compiled for law-enforcement purposes. This claim to exemption is misplaced as appellant strenuously contends.

To be sure, it appears from the sparse record available that the CIA investigation of Weissman, an American citizen, may well have been a genuine attempt to determine whether he was a safe candidate for recruitment by the Agency. Accepting this as a fact, however, it is clear that the CIA nonetheless conducted an intermittent but extensive investigation over a five-year period of an American citizen living at home, without his knowledge. It cannot be contended that this activity was for law-enforcement purposes.

The National Security Act of 1947, which created the CIA⁴ and empowered it to correlate and evaluate intelligence relating to the national security, specifically provided that the "Agency shall have no police, subpoena, law-enforcement powers, or internal-security functions." 50 U.S.C. § 403(d) (3). This directive was intended, at the very least, to prohibit the CIA from conducting se-

mation Act." H.R. Rep. 93-1389, 93d Cong., 2d Sess., 12 (1974); see also S. Rep. No. 93-854, 93d Cong., 2d Sess., 16 (1974).

⁴ Under a Presidential Directive, 11 Fed. Reg. 1339 (Feb. 1946), the Agency had temporarily operated as the Central Intelligence Group (CIG).

secret investigations of United States citizens, in this country, who have no connection with the Agency.

The Agency has been given far-reaching authority to gather information and to conduct intelligence activities abroad. These vital functions are liberally financed and concern national security. It is generally accepted that the Agency, in both its reporting and operational functions, serves an essential role in the development and implementation of foreign policy. The Agency, of course, proceeds in secret. Many of its operations are covert, and since the stakes are high few are in a position to know or to question the manner by which it carries out its work. It has the power that flows from money and stealth. Congress was well aware such activities create a potential for abuse, and chose to limit the Agency's activities to intelligence gathering abroad. It was unwilling to make it a policeman at home, or to create a conflict between the CIA and the FBI.

The legislative history of the CIA enabling act is sketchy, but these concerns are abundantly clear. Congress wisely sought from the outset to make sure that when it released the CIA genie from the lamp, the Agency would be prevented from using its enormous resources and broad delegation of power to place United States citizens living at home under surveillance and scrutiny. It denied the Agency police or internal-security functions to obviate the possibility that overzealous representatives of the CIA might pry into the lives and thoughts of citizens whose conduct or words might seem unconventional or subversive. Thus, during floor debates in the House, for example, a member of the Committee which considered the legislation stated:

This Central Intelligence Agency is supposed to collect military intelligence abroad, but we want to be sure it cannot strike down into the lives of our own people here. So, we put in a provision that

"the Agency shall have no police, subpoena, law-enforcement powers, or internal-security functions."

93 Cong. Rec. 9444 (1947) (remarks of Congressman Judd).

Congress had a realistic fear of secret police that would move inward rather than outward, and assume prerogatives never intended. While the 80th Congress obviously, and for good reason, wished to protect America's security, it had no intention of making the mistake of creating an American "Gestapo." As the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities ("Church Committee") recently reported, "By codifying the prohibition against police and internal security functions, Congress apparently felt that it had protected the American people from the possibility that the CIA might act in any way that would have an impact upon their rights."⁶

In spite of this congressional awareness and insistence, the CIA hopes to find support for this type of investigation into a citizen's background by reference to 50 U.S.C. § 403(d) (3), which, while denying the CIA any internal security functions, also states "... the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure

⁵ The fear of creating a secret police and the intention to avoid such an error pervaded congressional consideration of the new intelligence agency. See, e.g., 93 Cong. Rec. 9413 (1947) (remarks of Congressman Harness); Senate Armed Services Committee, Hearings on S. 753, 80th Cong., 1st Sess. 497 (1947) (remarks of General Vandenberg); House Expenditure in the Executive Department Committee, Hearings on H.R. 2319, 80th Cong., 1st Sess. 127, 433, 479-481 (1947).

⁶ S. Rep. No. 94-755, 94th Cong., 2d Sess. Book I, 133 (1974).

sure." This provision contains no grant of power to conduct security investigations of unwitting American citizens. As the Rockefeller Commission noted,⁷ and as the Church Committee stated, the provision

... was not viewed as conveying new authority to investigate; rather it charged the Director of Central Intelligence Agency with responsibility to use the authority which he already had to protect sensitive intelligence information.

S. Rep. No. 94-755, *supra*, Book I at 139.

Whatever may be the power to check on its own personnel, we are obliged to agree with the Church Committee when it commented on § 403(d)(3):

Given the prohibition against internal security functions, it is unlikely that the provision was meant to include investigations of private American nationals who had no contact with the CIA, on the grounds that eventually their activities might threaten the Agency.

S. Rep. No. 94-755, *supra*, Book I, 139. See also, Report to the President, *supra*, at 165-166.

Thus, the Agency's interpretation of the sources and methods proviso is misplaced. A full background check

Report to the President, Commission on CIA Activities Within the United States, 53 (1975).

In its recommendations to the President, the Rockefeller Commission suggested that the CIA be given power to investigate persons "being considered for affiliation" with the CIA, "or others who require clearance by the CIA to receive classified information." Report to the President, *supra*, at 66. In its Recommendations, the Church Committee suggested that the CIA not be allowed to investigate through surveillance any American national not affiliated with the CIA; but should be allowed to collect information through confidential interviews about "individuals or organizations being considered by the CIA as potential sources of information. . . ." S. Rep. No. 94-755, *supra*, at Book II, 302-303.

within the United States of a citizen who never had any relationship with the CIA is not authorized, and the law-enforcement exemption is accordingly unavailable. The Agency simply has no authority in the guise of law enforcement to make such a background check of Weissman with a view to his possible recruitment.

III. IN CAMERA INSPECTION

Finally, appellant contends that by refusing to conduct an *in camera* examination of documents before sustaining Agency claims of exemption under sections (b) (1), (3) and (7), the District Court failed to follow proper procedures. He asserts that an *in camera* inspection of documents withheld under (b) (1) was especially necessary because the affidavits were not sufficiently detailed to permit scrutiny of the Agency claims. He also urges that the *in camera* procedure was required to check the truthfulness of Agency claims under each exemption, and to conduct a line-by-line analysis of documents withheld under each exemption to cull out any non-exempt material.

While the FOIA itself now provides for *in camera* inspections, 5 U.S.C. § 552(a)(4)(B),⁸ it is clear from the legislative history that this section merely "permit[s] such *in camera* inspection at the discretion of the Court." H.R. Rep. No. 93-1380, Conference Rep. 93d Cong., 2d Sess., 9 (1974). As Congress indicated, before the Court orders *in camera* inspection, the

Government should be given the opportunity to establish by means of testimony or detailed affidavits

"... the court . . . may examine the contents of such agency records *in camera* to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b)" § 552(a)(4)(B) (emphasis added).

that the documents are clearly exempt from disclosure.

Ibid. See also, S. Rep. No. 93-854, 93rd Cong., 2d Sess. 15 (1974).

We adopted this view in *Vaughn v. Rosen*, which specified that where the public record is sufficient to permit a legal ruling, the inquiry need go no further, 157 U.S. App. D.C. 340, 484 F.2d 820, 824 (1973); see also, *Environmental Protection Agency v. Mink*, 410 U.S. 73 (1973), and indicated in *Phillippi v. Central Intelligence Agency*, *supra*, that *in camera* proceedings are particularly a last resort in "national security" situations.

The reluctance of Congress and the Courts to require *in camera* inspection is well founded. *In camera* inspections are burdensome and are conducted without the benefit of an adversary proceeding. *Vaughn*, *supra*, at 824. A denial of confrontation creates suspicions of unfairness and is inconsistent with our traditions.

Additional considerations apply to *in camera* proceedings under exemption (b)(1) where classification of documents is involved. Judges have the skill or experience to weigh the representations of disclosure of intelligence information. Congress was well aware of this problem, and when it amended the FOIA to permit *in camera* inspection in exemption (b)(1) cases, it indicated it was not to substitute its judgment for that of the agency.¹¹ If exemption is claimed on the basis of national security the District Court must, of course,

¹¹ "This standard of review does not allow the court to substitute its judgment for that of the agency—as under a *de novo* review—but neither does it require the court to defer to the discretion of the agency, even if it finds the determination not arbitrary or capricious. Only if the court finds the withholding to be without a reasonable basis under the applicable Executive order or statute may it order the documents released." S. Rep. No. 93-854, *supra*, at 16.

be satisfied that proper procedures have been followed, that the claim is not pretextual or unreasonable, and that by its sufficient description the contested document logically falls into the category of the exemption indicated. It need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith.

In every FOIA case, there exists the possibility that Government affidavits claiming exemptions will be untruthful. Likewise, in every FOIA case it is possible that some bits of non-exempt material may be found among exempt material, even after a thorough agency evaluation. If, as appellant argues, these possibilities are enough automatically to trigger an *in camera* investigation, one will be required in every FOIA case.¹² This is clearly not what Congress intended, nor what this Court has found to be necessary.

When Congress amended the FOIA in 1974 to provide that any reasonably segregable non-exempt portion of an agency record should be released, 5 U.S.C. § 552 (b) (Pub. L. 93-502 § 2(c)), this addition was meant to endorse judicial decisions holding that Congress did not intend to exempt an entire document "merely because it contained some confidential information."¹³ But, neither the legislative history, nor court decisions, have

¹² It should be noted that this is no small matter. The number of FOIA complaints filed in the District of Columbia tripled this past year and totalled 183 cases. It should also be noted that 30 percent of the closed cases are appealed to this Court. (The national average rate of appeals for all cases is nine percent.) *In camera* inspection in each FOIA case would create a staggering burden both for this Court and the District Court.

¹³ *Grumman Aircraft Engineering Corp. v. Renegotiation Bd.*, 475 F.2d 578, 580 (D.C. Cir. 1970), quoted in S. Rep. No. 93-854, 93d Cong., 2d Sess. 31 (1974).

indicated that it was appropriate for the District Courts to undertake a line-by-line analysis of agency records in each case. This Court has noted the difficulty of such a task, and held that such an investment of judicial energy was not justified, or even permissible. *Vaughn v. Rosen*, *supra*, at 825. "The burden has been placed specifically by statute on the Government." *Ibid.* It is only where the record is vague and the agency claims too sweeping or suggestive of bad faith that a District Court should conduct an *in camera* examination to look for segregable non-exempt matter.

The CIA dealt with the instant request in a conscientious manner. It disclosed much material, it released additional material as the result of an administrative appeal, and it came forward with newly discovered documents as located. Agency documents have been released to plaintiff-appellant on four separate occasions.¹² The Agency submitted affidavits summarizing each document, or portion of a document withheld, and indicated the rationale for each claimed exemption. It filed an indexed description of all material withheld, and supported the withholding by explicit affidavits. No discovery was attempted; plaintiff simply contested the adequacy of the affidavits. There is no reason, on this record, to presume bad faith on the part of the CIA. In this instance, the CIA released some documents in their entirety and portions of 22 others. From the deletions in the partially released documents, and the Agency explanations for these deletions, the District Court could well

¹² On May 16, 1975, portions of two documents were released. On July 3, 1975, additional portions of those two documents were released, and portions of seven more documents that had been discovered after the initial Agency reply. On January 8, 1976, portions of nine additional documents and one entire document were released. On January 29, 1976, 15 more documents, or portions thereof, including some portions previously deleted, were released.

determine that the Agency was not improperly withholding information. Such an examination of a full record can take the place of a partial, or sampling, *in camera* inspection. See *Ash Grove Cement Co. v. FTC*, 511 F.2d 815 (D.C. Cir. 1975). The District Court was correct in refusing to conduct an *in camera* inspection to check the veracity of Agency claims or to search for non-exempt material and no abuse of discretion has been shown. Where it is clear from the record that an agency has not exempted whole documents merely because they contain some exempt material,¹⁴ it is unnecessary and often unwise for a court to undertake such an examination.

IV. CONCLUSION

As the above discussion indicates, the trial judge was well within his discretion in refusing to order an *in camera* examination. The Agency claims for exemptions under section (b)(1) and (b)(3) were properly sustained. However, exemptions under section (b)(7) are not available to the CIA except under special collateral circumstances.¹⁵ There are 29 documents where claims for exemption under various subsections of (b)(7) were made. While in most instances these claims were coupled with claims under (b)(3), it is still necessary to remand the case to the District Court to determine whether all or part of any of the 29 documents should be re-

¹⁴ In some limited instances a stronger standard may apply. See, e.g., *Cunco v. Schlesinger*, 484 F.2d 1086 (D.C. Cir. 1973), where the issue was whether "secret law" was being withheld. However, we do not deal with that issue here.

¹⁵ For example, in the case of three documents, Nos. 12, 44 and 46, an exemption under (b)(7) was claimed to protect the names of FBI law enforcement officers. The exemption was properly claimed in this instance in conjunction with the claims for exemption of the same three documents under exemptions (b)(1) and (3).

leased. The Agency may well be able to show that the claim of exemption (b) (3) alone, or coupled with other exemptions, is sufficient to protect the document against disclosure even in the absence of (b) (7), but this cannot be ascertained on the basis of the papers brought here on the appeal.

The judgment below is affirmed in all respects except as it relates to documents claimed to be exempt under section (b) (7), other than Nos. 12, 44 and 46, and the case in this respect alone is remanded to the District Court for further proceedings consistent with this opinion.

Applied

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1585

September Term, 1976

Mary A. Weissman,
Plaintiff-Appellant
v.
~~Central Intelligence Agency~~, et al.,
Defendants-Appellees

Civil Action No. 75-1583

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 4 1977

BEFORE: McGowan and Tamm, Circuit Judges; Gesell, U.S. District
Judge for the District of Columbia *GEORGE A. FISHER*

ORDER

It is ORDERED by the Court, sua sponte, that the Opinion for the Court heretofore filed in this case on January 6, 1977 be, and it hereby is, amended by striking in its entirety the paragraph beginning on Page 10 which extends onto Page 11, including Paragraphs 10 to which it refers, and substituting in lieu thereof a new paragraph, including a new footnote, which shall be and read as follows:

Additional considerations apply to in camera proceedings under exemption (b) (1) where classification of documents is involved. Few judges have the skill or experience to weigh the repercussions of disclosure of intelligence information. Congress was well aware of this problem when it amended the FOIA to permit in camera inspection in exemption (b) (1) cases.^{10/} If exemption is claimed on the basis of national security the District Court must, of course, be satisfied that proper procedures have been followed, and that by its sufficient description the contested document logically falls into the category of the exemption indicated. In deciding whether to conduct an in camera inspection it need not go further to test the expertise of the agency, or to question its veracity when nothing appears to raise the issue of good faith.

^{10/} Claims under (b) (1), like other claims of exemption, are subject to de novo review in the District Court. See 5 U.S.C. § 552(a) (4) (B). However, the legislative history of the 1974 amendments makes clear that, in evaluating (b) (1) claims under this standard, "substantial weight" is to be accorded to detailed agency affidavits setting forth the basis for exemption:

[T]he conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse effects might occur as a result of public disclosure of a particular classified record. Accordingly, the conferees expect that the federal

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 76-1566

Page 2 *

September Term, 19 76

courts, in making de novo determinations in section 552(b) (1) cases under the Freedom of Information Act, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record. S. Rep. 93-1200, 93d Cong., 2d Sess. 12 (1974).

See also Senator Muskie's remarks during the floor debate preceding the Senate's vote to override President Ford's veto of the amendments. 120 Cong. Rec. 36870 (1974) ("The judge would be required to give substantial weight to the classifying agency's opinion in determining the propriety of the classification.")

It is FURTHER ORDERED by the Court, sua sponte, that the word "and" in the eighth line on Page 12 of the Opinion for the Court is stricken and the word "or" is inserted in lieu thereof, so that as amended, the sentence of which that line is a part, shall be and read as follows: -

It is only where the record is vague or the agency claims too sweeping or suggestive of bad faith that a District Court should conduct an in camera examination to look for segregable non-exempt matter.

Per Curiam

For the Court:

George A. Fisher
GEORGE A. FISHER
Clerk

*Sitting by designation pursuant to 28 U.S.C. § 292(a).

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1566

* September Term, 1975

Gary A. Weissman,

Plaintiff-Appellant

Civil Action No. 75-1583

v.

Central Intelligence Agency, et al.,
Defendants-Appellees.

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 4 1977

BEFORE: McGowan and Tamm, Circuit Judges; Gasell*, U.S. District Judge for the District of Columbia. GEORGE A. FISHER
Clerk

ORDER

Upon consideration of the petitions for rehearing filed by the appellant and by the appellees, and of the brief filed by Senator Edward S. Muskie, as amicus curiae on behalf of appellant's petition for rehearing, and the Court having this date filed and entered an order amending the Opinion for the Court dated January 6, 1977, it is

ORDERED by the Court that both petitions are denied.

For the Court:

For the Court:

GEORGE A. FISHER
Clerk

*Sitting by designation pursuant to 28 U.S.C. § 292(a).

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF CALIFORNIA

3 JUDITH KATHERINE EXNER,)

4 Plaintiff,)

5 v.)

6 FBI, et al.,)

7 Defendants.)

No. 76-89-S

CERTIFICATE OF SERVICE

BY MAIL

10 STATE OF CALIFORNIA)
11) ss.
12 COUNTY OF SAN DIEGO)

13 IT IS HEREBY CERTIFIED that:

14 I, Nancy Amans, am a citizen of the United States
15 over the age of eighteen years and a resident of San Diego County,
16 California; my business address is 940 Front Street, San Diego,
California; I am not a party to the above-entitled action; and

17 On July 29, 1977, I deposited in the United States
18 mail at San Diego, California, in the above-entitled action, in
19 an envelope bearing the requisite postage, a copy of

20 DEFENDANTS' REPLY BRIEF

21
22
23 addressed to Richard C. Leonard, Esq. 433 North Camden Drive, Suite
24 1200, Beverly Hills, CA 90210

25 the last known address, at which place there is delivery service
26 of mail from the United States Postal Service.

27 I declare under penalty of perjury that the foregoing is
28 true and correct.

29 Executed on this 29 day of July, 19 77.

31
32
Nancy Amans

FEDERAL BUREAU OF INVESTIGATION
FOI/PA
DELETED PAGE INFORMATION SHEET
FOI/PA# 1349828-0

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UNITED STATES GOVERNMENT

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION*Memorandum*

TO : The Director

DATE: 3/2/79

FROM : Legal Counsel *J. J. [Signature]*SUBJECT: JUDITH KATHERINE EXNER
v. FEDERAL BUREAU OF INVESTIGATION, et al
(U.S.D.C., S.D. CAL.)
CIVIL ACTION NUMBER 76-89S
NINTH CIRCUIT NUMBERS 78-1152 and 78-1880

Assoc. Dir. _____
 Dep. AD Adm. _____
 Dep. AD Inv. _____
 Asst. Dir.: _____
 Adm. Servs. _____
 Crim. Inv. _____
 Ident. _____
 Intell. _____
 Laboratory _____
 Legal Coun. _____
 Plan. & Insp. _____
 Rec. Mgnt. _____
 Tech. Servs. _____
 Training _____
 Public Affs. Off. _____
 Telephone Rm. _____
 Director's Sec'y _____

PURPOSE:

To report recent developments in captioned case now on appeal before the Ninth Circuit and to advise of a request from the Appellate Section, Civil Division, Department of Justice, for the Bureau's recommendation with respect to a proposed motion to recuse presiding Judge Walter Ely.

SYNOPSIS AND DETAILS:

On 2/13/79, Ms. Linda Cole, Appellate Section, Civil Division, Department of Justice, telephonically contacted SA [redacted] of this Division to advise that certain recent developments have given rise to a question of conflict of interest on the part of Judge Walter Ely, presiding judge of the Ninth Circuit panel hearing the appeal of captioned case, and to solicit the Bureau's recommendation as to a motion by the Appellate Section for recusal. On 2/14/79, Ms. Cole confirmed this conversation by memorandum, a copy of which is attached hereto as Exhibit A. Pertinent details are as follows:

Oral arguments regarding captioned case were heard by a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit on 2/12/79, Judge Ely presiding. The major issue before the Court is whether the FBI has properly exempted certain systems of records from the disclosure provisions of the Privacy Act. This question arose in the context of plaintiff's Freedom of Information Act (FOIA) request for records pertaining to herself. Although no file was located of which plaintiff was the subject, several references to her were located in files pertaining to other

1 - [redacted]
 1 - [redacted]
 1 - [redacted]
 1 - [redacted]

1 - [redacted]
 1 - [redacted]
 1 - IPALU

(CONTINUED - SEE OVER)

JCH:cmw:kmr (8)

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57 MAR 27 1979

FBI/DOJ

To Director
From Legal Counsel

subjects, particularly the files pertaining to the FBI's anti-racketerring investigation of the late organized crime figure John Rosselli.

Those documents containing references to plaintiff were processed under the FOIA inasmuch as the system of records in which they were located is exempt from the disclosure provisions of the Privacy Act. (Title 5, United States Code, Sections 552a(j)(2) and (k)(2). Title 28, Code of Federal Regulations, Section 16.96(a)(1)).

The District Court, following in camera review of the disputed documents, upheld all of the exemptions claimed by the Government but awarded attorney's fees and costs to plaintiff. Plaintiff appealed the Court's ruling on the exemptions, and the Government appealed the ruling on attorney's fees.

On appeal, plaintiff does not challenge the application of the FOIA exemptions to the disputed documents. Rather, she asserts that the documents should have been processed under the Privacy Act instead of the FOIA and that the FBI should not be allowed to apply a blanket exemption to systems of records.

Ms. Cole advised that during oral arguments, Judge Ely stated that he had been Rosselli's lawyer at one time and further expressed concern that his own name may appear in the file. According to Ms. Cole, these comments were made by Judge Ely during a discussion of the extent to which the FBI could deny access under the Privacy Act to persons whose names appear in the organized crime files.

Judge Ely also directed Government counsel to advise of the whereabouts of the in camera exhibit in the event the Court should decide to review the material. The exhibit consists primarily of documents from the Rosselli files which were submitted to the District Court in connection with plaintiff's FOIA claim. It is noted that the exhibit was not designated for inclusion in the record on appeal by either party and does not appear to be germane. Regardless, Ms. Cole has indicated that in her opinion any move by the Government to preclude review of the in camera documents by Judge Ely will be without foundation unless preceeded by a motion for recusal.

To Director
From Legal Counsel

On 2/23/79, Ms. Cole provided to this office a copy of an affidavit of George C. Stoll which sets forth certain pertinent excerpts of the oral arguments. A copy of this affidavit is attached hereto as Exhibit B.

In addition, at the request of Ms. Cole this Bureau conducted a review of the disputed documents and the remaining portions of the Rosselli file, which disclosed two references to contacts made by either Rosselli or one of his colleagues to the law firm of Ely, Kadison and Quinn. The details of this review are set forth in the attached affidavit of SA [REDACTED], of the Records Management Division, marked Exhibit C.

b6
b7c

Ms. Cole has advised that it is her opinion, and that of her colleagues in the Appellate Section, that the above facts raise a serious question as to the ability of Judge Ely to review the matters on appeal objectively, and therefore justify a motion for recusal. Nevertheless, due to the serious nature of a move to recuse a Federal judge, the Appellate Section is requesting any recommendation which the Bureau may desire to make with respect to such action. Ms. Cole indicated that the proposed motion has been drafted and that it is the intention of the Appellate Section at this time to seek Attorney General approval prior to filing. A draft of the proposed motion is attached hereto as Exhibit D.

Based upon discussions with the Departmental attorney, and review of the foregoing facts, Legal Counsel Division concurs in the judgment of the Appellate Section that a motion to recuse is justified under Title 28, United States Code, Section 455(a) which requires a judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." In view of the potential impact that such an action could have on this appeal, as well as others before the Ninth Circuit of which only the Department can be fully aware, it is the opinion of Legal Counsel Division that the final decision must rest with the Department and that the Bureau should defer to their judgment.

To Director
From Legal Counsel

RECOMMENDATION:

1. That the Director advise the Department of Justice that the Bureau defers to the judgment of the Department with respect to the proposed action by the Appellate Section to move for recusal of Judge Walter Ely from further review of captioned case *JEH*

*And indicate
no objection
I think it must be
done*

APPROVED: *[Signature]*

Director _____
Assoc. Dir. _____
Dep. AD Adm. _____
Dep. AD Inv. _____

Adm. Serv. _____
Crim. Inv. _____
Ident. _____
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Legal Coun. *m/jr* _____
Plan. & Insp. _____
Rec. Mgnt. _____
Tech. Servs. _____
Training _____
Public Affs. Off. _____

2. That the attached letter setting forth the Bureau's position be forwarded to the Civil Division, Department of Justice. *JEH*

APPROVED: *[Signature]*

Director _____
Assoc. Dir. _____
Dep. AD Adm. _____
Dep. AD Inv. _____

Adm. Serv. _____
Crim. Inv. _____
Ident. _____
Intell. _____
Laboratory _____

Legal Coun. *m/jr* _____
Plan. & Insp. _____
Rec. Mgnt. _____
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Public Affs. Off. _____

Enclosures (4)



62-116929-36X1

~~197-900-2~~

ENCLOSURE

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUDITH KATHERINE EXNER,

Plaintiff-Appellant
and Appellee,

v.

FEDERAL BUREAU OF INVESTIGATION,
WILLIAM H. WEBSTER, Director,
Federal Bureau of Investigation,
UNITED STATES DEPARTMENT OF JUSTICE
and GRIFFIN B. BELL, Attorney General
of the United States,

Defendant-Appellees
and Appellants.

No. 78-1152

and

No. 78-1880

MOTION TO RECUSE

TO THE HONORABLE JUDGE WALTER ELY:

Defendants, the Federal Bureau of Investigation, William H. Webster, the Department of Justice and Griffin B. Bell, respectfully submit this motion that Your Honor recuse himself from further participation in the above captioned appeals in light of facts which came to defendants' attention as a result of comments made at the February 12, 1979 oral argument in the above-captioned case.^{1/} Defendants respectfully request Your Honor to consider these newly discovered facts in light of the recent amendment to the recusal statute and

^{1/} Immediately after returning to Washington, D.C., the appellate attorney who argued this case for the government brought these comments to the attention of her review officer at the Department of Justice. The FBI was then immediately requested to check its relevant files, steps were immediately taken to obtain a transcript of the oral argument, and necessary research into the recusal statute was immediately commenced. After a careful study of the entire matter, the decision was reached, as quickly as possible, to file the instant motion.

EXHIBIT D

to grant the instant motion because, in light of those facts, your "impartiality might reasonably be questioned." 28 U.S.C. 455(a). We believe that it is our duty to file the instant motion in order to vindicate the important public policies which underlie the recusal statute and to provide Your Honor with the protections which the statute was designed to afford federal judges.

The Newly Discovered Facts

This case involves the efforts of plaintiff Judith Katherine Exner to obtain documents from the Central Records System of the Federal Bureau of Investigation which contain references to her. Because the Privacy Act contains broad exemptions for law enforcement agencies and for law enforcement files, the FBI processed Mrs. Exner's request solely under the Freedom of Information Act. Pursuant to the latter statute, the FBI released over two hundred pages to Mrs. Exner. The FBI withheld additional material on the grounds that its release would invade the privacy of persons other than Mrs. Exner who were also named in the documents. The district court examined all of the disputed material in camera and upheld both the FBI's reading of the exemptions to the Privacy Act and its invocation of the exemption to the Freedom of Information Act which pertains to clearly unwarranted invasions of personal privacy. Plaintiff appealed these rulings of the district court and the government cross-appealed from the court's award of attorneys' fees to plaintiff.

The case was fully briefed and orally argued on February 12, 1979, before a panel of this Court consisting of Your Honor, Circuit Judge Wallace and District Court Judge Pregerson. The instant motion to recuse stems from comments made by Your Honor at the oral argument. As noted on page five of the government's main brief on the appeal, over 95% of the disputed material in this case came from files which were compiled during the anti-racketeering investigation of John Roselli. Twice during oral argument, Your Honor commented that he had been John Roselli's lawyer.^{2/} In addition, both Judge Wallace and Your Honor requested government counsel to advise the Court of the location of the in camera exhibit which was submitted to the district court but which was not designated as part of the record on appeal.^{3/} See the attached affidavit of George C. Stoll which contains a transcription of the relevant portions of the oral argument.^{4/}

^{2/} By filing this motion, the government, of course, does not suggest any impropriety whatsoever in Your Honor's hearing oral argument in the first place. This motion is based solely upon (1) comments which were obviously evoked as a spontaneous response to the colloquy at oral argument concerning events which Your Honor had long since forgotten and (2) the FBI's post-argument examination of the files in question.

^{3/} Earlier during the argument, Judge Wallace raised the question of the location of the documents.

^{4/} Mr. Stoll's affidavit at one point refers to "Rosetta" rather than "Roselli." However, it is clear from the context that John Roselli was the individual under discussion. We have also been advised that the word "intelligible" was inadvertently typed in the affidavit instead of the correct "unintelligible."

Because Your Honor's comments raised the possibility that your name might appear in the very files which are the subject of this appeal,^{5/} the Department of Justice immediately asked the FBI to ascertain whether or not this situation did exist. The attached affidavit of John F. Loome indicates that the name of Your Honor's former law firm (Ely, Kadison and Quinn) does appear both in the portions of the Roselli files from which the documents pertaining to Mrs. Exner were drawn and in the actual in camera exhibit itself.

The Amendment To The Recusal Statute

In 1974, Congress amended the recusal statute to provide that "[a]ny justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. 455(a). The legislative history demonstrates that Congress amended the statute in order to protect federal judges from "uncertain language [which] has had the effect of forcing a judge to decide either the legal issue or the ethical issue at his peril" and to "promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify and let another judge preside over the case." H. Rep. No. 93-1453, 93d Cong., 2d Sess. 2, 5 (1974),

^{5/} At the oral argument, Your Honor stated: "I hope it doesn't have any reference to me because I represented one of the plaintiffs in an isolated matter. . . ."

reprinted in 1974 U.S. Code Cong. and Admin. News at 6352 and 6355.

Thus, the post-1974 test for recusal is not whether the judge could, as a subjective matter, decide the case with impartiality. The test is whether, under the circumstances, a reasonable man might question the judge's ability to do so. Davis v. Board of School Commissioners, 517 F. 2d 1044, 1052 (5th Cir. 1975), rehearing denied, 521 F. 2d 814 (1975), certiorari denied, 425 U.S. 944 (1976). Indeed, under the amended statute, the "appearance of impartiality is virtually as important as the fact of impartiality." Webbe v. McGhie Land Title Co., 549 F. 2d 1358, 3161 (10th Cir. 1977).

The Recusal Statute as Applied to the Instant Case

The fact that the name of Your Honor's law firm (Ely, Kadison and Quinn) appears in the very files which are at issue in this case places Your Honor's personal interests at the very center of this litigation. On the one hand, Your Honor's position can be directly analogized to that of the plaintiff in this case. The district court found that Mrs. Exner's name appears throughout the Roselli files on a sporadic and incidental basis. The Loomer affidavit shows that Your Honor's law firm also appears in those files on two occasions. At the oral argument, Your Honor noted that he had been John Roselli's lawyer. It appears, therefore, that Your Honor, like the plaintiff, may have a substantial interest in access to those files. On the other hand, Your

Honor's position is directly analogous to the position of the third parties whose interests the government has tried to protect by withholding documents from Mrs. Exner under Exemption b(7)(C) to the Freedom of Information Act. It thus appears that no matter how Your Honor decides this case, it could reasonably be contended that he has allowed his personal interests to influence his actions. If Your Honor rules for plaintiff, it can be asserted that he has vindicated his own right of access. If Your Honor rules for the government, it can be asserted that he has protected his own privacy.

In our view, therefore, this case fits squarely within the language and spirit of the recusal statute since this is a case in which Your Honor's "impartiality might reasonably be questioned." 28 U.S.C. 455(a). The remedy of recusal provided by the statute must therefore be applied in order to protect the reputation of the federal judiciary and to afford Your Honor the protection which the recusal statute was designed to provide federal judges.

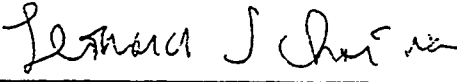
There is an additional consideration which lends further, independent, support to the motion to recuse. As noted above, at the oral argument, Judge Wallace and Your Honor expressed an interest in the in camera exhibit. If Your Honor, as a private citizen, had submitted a request for references to himself or his law firm contained in the in camera exhibit, that request would most probably have been denied by the FBI on the same grounds as it denied access to Mrs. Exner. If the

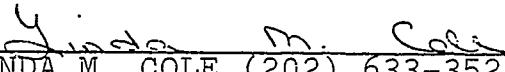
panel of which Your Honor is a member should, in deciding the instant appeals, seek in camera inspection of the documents, Your Honor would be provided materials in his judicial capacity which would have been withheld from him in his personal capacity. Any appearance that a judge has used his office to gain a personal advantage must be avoided.

For the foregoing reasons, defendants respectfully request Your Honor to recuse himself from further participation in the above-captioned appeals.^{6/}

Respectfully submitted,

BARBARA ALLEN BABCOCK
Assistant Attorney General,


LEONARD SCHAITMAN (202) 633-3321


LINDA M. COLE (202) 633-3525
Attorneys,
Civil Division,
Department of Justice,
Washington, D.C. 20530.

^{6/} While the appearance of lack of impartiality is directly raised only in plaintiff's appeal from the district court's adverse rulings on access, the government's cross-appeal on attorneys' fees arises out of the same case and its appeal was consolidated, by order of this Court, with plaintiff's appeal. It would be inappropriate for Your Honor to continue to sit on the government's appeal, while recusing himself from plaintiff's appeal, since the cases are so intimately connected.

~~197-900-7~~

62-116929-36X1



UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

February 14, 1979

Address Reply to the
Division Indicated
and Refer to Initials and Number

LMCole:wm
145-12-2683

TELEPHONE:
(202) 633-3525

John Hall, Esquire
Legal Division.
Federal Bureau of Investigation
Washington, D. C. 20535

Re: Judith Katherine Exner v. Federal Bureau of
Investigation (C.A. 9, No. 78-1152 and
78-1880)

Dear Mr. Hall:

This letter will confirm our telephone conversation of February 13, 1979. At that time, I informed you of the statements which the presiding judge made at oral argument in the above-captioned cases. The judge's statements are also summarized in the enclosed memorandum to the files which I wrote on the day after the argument.

As you know, 95% of the documents at stake in the Exner case were drawn from the Bureau's files on John Roselli. In view of the judge's statement that he was once Roselli's lawyer and in view of his statement that he too may appear in the Roselli files, we asked you to send us a recommendation concerning a possible motion to disqualify. Given the extreme sensitivity of asking a federal judge to step down, we would request that any recommendation in favor of filing such a motion be signed by Director Webster.

Very truly yours,

Linda M. Cole
Linda M. Cole
Attorney, Appellate Staff
Civil Division

Enclosure

EXHIBIT A



UNITED STATES GOVERNMENT

Memorandum

TO : MEMORANDUM TO THE FILE

DATE: February 13, 1979
LMCole:wm

FROM : Linda M. Cole
Attorney, Appellate Staff
Civil Division

LMC
SUBJECT: Judith Katherine Exner v. Federal Bureau of
Investigation, et al. (C.A. 9, No. 78-1152
and No. 78-1880)

On Monday, February 12, 1979, I presented oral argument in the above-captioned cases. The appeal in No. 78-1152 concerns the scope of the F.B.I.'s exemption from the Privacy Act. The underlying facts concern Judith Exner's attempt to obtain information from the F.B.I.'s organized crime files. As noted at p. 5 of our main brief, over 95% of the documents in dispute were drawn from files compiled during the anti-racketeering investigation of John Roselli.

At oral argument, the presiding judge (Walter Ely) stated that, prior to his elevation to the bench, he had been John Roselli's lawyer. Judge Ely further noted that his name probably appears in the Roselli files too. The judge made these comments during a discussion of the extent to which the F.B.I. could exclude persons who are named in the organized crime files from access to those files under the Privacy Act.

The judge also directed government counsel to send the Court a letter stating the whereabouts of the in camera exhibit so that the Court would have the option of studying the materials in question. The exhibit consists primarily of material from the Roselli files which was submitted to the District Court in connection with Mrs. Exner's FOIA claims. Neither party designated the exhibit for inclusion in the record on appeal.



UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EXNER

Plaintiff-Appellant.)

v.

FEDERAL BUREAU OF INVESTIGATION,)

Defendant-Appellee.)

NOS. 78-1152/78-1880

AFFIDAVIT OF GEORGE C. STOLL

On February 16, 1979 I obtained a cassette tape of an oral argument in Case Number 78-1152/78-1880, Exner v. Federal Bureau of Investigation from the Clerk's Office of the United States Court of Appeals for the Ninth Circuit. The panel of the Court which heard that argument consisted of Circuit Judges Ely, Wallace and District Judge Pregerson. I am personally familiar with the voices of Circuit Judges Ely and Wallace.

I have faithfully transcribed the following statements from that tape:

1. At approximately eighteen minutes and thirty seconds appellant's counsel was arguing: You are not protecting their privacy if she already knows who they are. What you are doing is giving her a chance to correct an incorrect record. I don't see how you can protect Giancana's and Roselli's privacy at this point, they are dead, they have no real interest. Even if they (third parties) have an interest ...(unintelligible interruption by court)... Even if they did have an interest to the extent the records relate to their relationship with Mrs. Exner, she knows about it already. What privacy are you protecting? Thats why the

EXHIBIT B

Privacy Act has to be different from the Freedom of Information Act.

Judge Wallace: Maybe the deceased widow of one of the ... or the widow of one of the deceased... or other privacy interests in ...

Appellant's Counsel: We're not asking to make them public ... interrupted

Judge Ely: John Rosetta didn't have a witness. John Rosetta wasn't ... unintelligible ... interrupted.

Appellant's Counsel: You see theres a difference under the ... interrupted

Judge Wallace: I don't know, I didn't follow it that closely..

Judge Ely: He was my client. (Laughter in the Court) Well maybe he got a widow. (Laughter in the Court) Maybe he had one when he ... he disappeared in some shoes of cement ... interrupted

Appellant's Counsel: In a metal drum of some sort. Under the Freedom of Information Act... argument continued.

2. About 43 minutes into the argument:

Appellee's Attorney: Then I would refer, your honor, to the District Judge's finding of fact that the information which the FBI has withheld consists of voluminous organized crime investigation reports which do not pertain in any way to the plaintiff and which are wholly outside the scope of her disclosure ... I'm reading from the quotation on page four of our brief...she's a ... interrupted.

Judge Ely: I hope it doesn't have any reference to me because I represented one of these people in an isolated matter ... intelligible...but well, well I don't care whether

it does or not.

Appellee's Counsel: I just refer your honor...argument continues...

3. After Conclusion of Rebuttal at approximately fifty eight minutes:

Judge Ely: Miss Cole (Appellee's attorney) do you know where the documents are?

Appellee's Attorney: Ah... your Honor I don't know, we did not designate them as part of the record on appeal and neither did opposing counsel. If the Court wants to see them of course...interrupted.

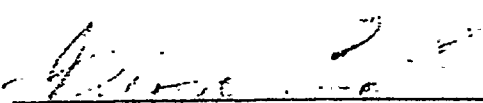
Judge Ely: Would you mind writing us a letter within the next ten days with a copy to counsel, just telling us where the records are.

Appellee's Attorney: Yes your Honor.

I declare under penalty of perjury that the foregoing transcribed material is true and correct.

Dated: 2-17-1979

Respectfully submitted,



GEORGE CHRISTOPHER STOLL
Assistant United States Attorney

1 UNITED STATES COURT OF APPEALS
2 FOR THE NINTH CIRCUIT
3

4 JUDITH KATHERINE EXNER

5 Plaintiff-Appellant,

6 v.

Nos. 78-1152
78-1880

7 FEDERAL BUREAU OF INVESTIGATION, et al.,
8 Defendant-Appellee.
9

10 AFFIDAVIT OF JOHN F. LOOME, JR.

11 I, John F. Loome, Jr., being duly sworn, depose and
12 say as follows:

13 (1) I am a Special Agent of the Federal Bureau of
14 Investigation (FBI), assigned in a supervisory capacity to the
15 Freedom of Information-Privacy Acts (FOIPA) Branch, Records
16 Management Division, at FBI Headquarters (FBIHQ), Washington,
17 D. C.

18 (2) Due to the nature of my official duties, I am
19 personally familiar with plaintiff's Freedom of Information Act
20 (FOIA) request for information located within the files of the
21 FBI and subsequent lawsuit.

22 (3) It has come to my attention that during oral
23 argument before a three judge panel of the United States
24 Court of Appeals for the 9th Circuit, the presiding Judge,
25 Walter Ely, commented to the Government Counsel that he at
26 one time had served as attorney for one John Rosselli.
27 Inasmuch as the bulk of the disputed documents in this
28 litigation currently being reviewed by the Court are from an
29 investigatory file maintained by the FBI wherein the subject
30 of investigation was the late John Rosselli, Ms. Linda Cole,
31 an attorney for the United States Department of Justice,
32 requested that a review of the disputed records be made to

1 determine whether or not such an attorney-client relationship
2 is reflected within the aforesaid documents.

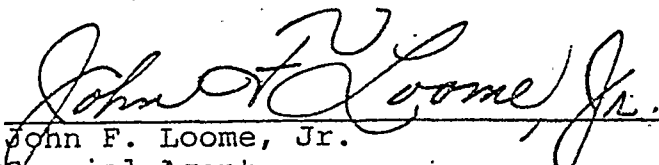
3 (4) Pursuant to this request, a review was made
4 of those documents reviewed by the United States District
5 Court for the Southern District of California, in camera in
6 connection with this litigation and the investigative file
7 relating to the late John Rosselli which consists of 38
8 volumes.

9 (5) In connection with the FBI's investigation into
10 the activities of the late John Rosselli, information relating
11 to contacts made by Mr. Rosselli and his associates were
12 recorded in investigative reports which were filed in his
13 investigatory file. One such report which was included in
14 the documents submitted to the Court for in camera review,
15 contained the name of the lawfirm of Ely, Kadison and Quinn,
16 550 South Flower, Room 1111. This record contained no further
17 information relating to this firm nor information as to the
18 circumstances for the contact.

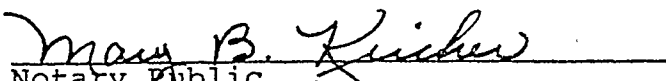
19 (6) In our review of all 38 volumes of the investi-
20 gatory file regarding the late John Rosselli, one additional
21 reference to the firm, Ely, Kadison and Quinn, Attorneys,
22 Room 1111, 550 South Flower, Los Angeles, California, was
23 located. This material set forth information indicating that
24 the late John Rosselli or someone connected with him had been
25 in contact with the aforesaid firm. This record contained no
26 further information relating to this firm or circumstances for
27 the contact.

28 (7) In addition, a search of our central indices
29 was conducted to determine if the names of Walter Ely or Ely,
30 Kadison and Quinn had been indexed in the investigatory file
31 relating to the late John Rosselli. This search was negative.
32

1 (8) It should be noted that all names of individuals
2 or organizations appearing in documents maintained in the FBI's
3 central records are not indexed and readily retrievable. The
4 decision to index is made by the investigative Agent within a
5 field office, or an FBI Headquarters supervisor, except for the
6 names of subject(s), suspects(s) or victim(s) carried in the
7 case caption, which are automatically indexed. Therefore, unless
8 an index card has been prepared and filed, names appearing within
9 our files are not readily accessible. A good case in point is
10 as indicated within this affidavit wherein it is pointed out
11 that the name of the firm Ely, Kadison and Quinn is not recorded
12 in our central indices, however, the name was located in two
13 instances by a page by page review of the Rosselli file.

14 
15 John F. Loome, Jr.
16 Special Agent
17 Federal Bureau of Investigation
Washington, D. C.

18 Subscribed and sworn to before me this 27th day of February, 1979.

19
20 
21 Notary Public

22 My Commission expires Sept. 14, 1982
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March 2, 1979

Ms. Barbara A. Laddock
Assistant Attorney General
Civil Division
Department of Justice

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Re: JUDICIAL INTERIMINARY MATTER
V. JAMES A. BURKE OF LAWYERS' GUILD, et al
(U.S.D.C., S.D. Cal.)
CIVIL DIVISION, CASE NO. 78-892
JUDICIAL INTERIMINARY 78-1152 and 78-1500

FEDERAL GOVERNMENT

Dear Ms. Laddock:

Reference is made to the telephone conversation between Ms. Linda Cole, an attorney in the Appellate Section, Civil Division, and Special Agent [redacted] of this Bureau's Legal Counsel Division on February 15, 1979, and to Ms. Cole's confining memorandum dated February 16, 1979.

By the referenced communications, Ms. Cole advised this Bureau of certain developments which arose during oral arguments on captioned case on February 12, 1979, before a three-judge panel of the Ninth Circuit Court of Appeals, and which give rise to a question of conflict of interest on the part of presiding Judge Walter Rye. In view of the serious nature of a motion to recuse a Federal judge, Ms. Cole requested the Bureau's recommendation with respect to such action.

The pertinent factors are as follows: **REC-114 197-965-3** **13** **22 MAR 12 1979**

(1) The major issue in dispute in this case is the authority of the FBI to exempt certain systems of records from disclosure pursuant to the Privacy Act. (Title 5, United States Code, Section 552a(j)(2) and (k)(3)). The disputed records, to which plaintiff seeks access, are almost entirely from the files pertaining to the FBI's anti-racketeering investigation of the late John Rospolli.

Assoc. Dir. _____
Dep. AD Adm. _____
Dep. AD Inv. _____
Asst. Dir.: _____
Adm. Servs. _____
Crim. Inv. _____
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Laboratory _____
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Tech. Servs. _____
Training _____
Public Affs. Off. _____
Telephone Rm. _____
Director's Sec'y _____

(SEE NOTE PAGE 2)

MAIL ROOM ☐

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Ms. Barbara A. Babcock
Assistant Attorney General

(2) During oral argument on February 12, 1979, Judge Ely stated that he had at one time served as Rosselli's attorney and expressed concern that his name might appear in the file.

(3) The transcript of the oral arguments confirms that such statements were made.

(4) A review of the disputed documents and the remaining portions of the Rosselli file discloses two references which appear to confirm Judge Ely's statement that he represented Rosselli at one time.

Although I am fully aware of the very serious implications inherent in moving for the recusal of a Federal judge in a particular case, I concur with the judgment of the Appellate Section that the foregoing facts appear to justify such action in this instance.

However, due to the gravity of the proposed action, and the potential impact on this appeal, as well as other matters which the Department may have before the Ninth Circuit, I believe the ultimate decision should rest with the Department of Justice, therefore the FBI defers to your judgment in this matter.

Very truly yours,

William H. Webster
Director
Federal Bureau of Investigation

"And I am entirely satisfied with
the draft motion."

NOTE:

See Legal Counsel memorandum to Director, captioned
and dated as above.

- 2 -

APPROVED:	Adm. Serv. _____	Legal Coun. _____
Director _____	Crim. Inv. _____	Plan. & Insp. _____
Assoc. Dir. _____	Ident. _____	Rec. Mgmt. _____
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WHS
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UNITED STATES GOVERNMENT

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

Memorandum

Assoc. Dir. _____
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Dep. AD Inv. _____
Asst. Dir.: _____
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Crim. Inv. _____
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Intell. _____
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Tech. Servs. _____
Training _____
Public Affs. Off. _____
Telephone Rm. _____
Director's Sec'y _____

TO : The Director

DATE: 4/27/79

FROM : Legal Counsel *JAM*

SUBJECT: JUDITH KATHERINE EXNER
v. FEDERAL BUREAU OF INVESTIGATION, et al.
(U.S.D.C., S.D. CAL.)
CIVIL ACTION NUMBER 76-89S
NINTH CIRCUIT NUMBERS 78-1152 and 78-1880
(FOIPA LITIGATION)

PURPOSE: To advise that Judge Walter Ely has
recused himself from participation in
any further proceedings in connection with appeals numbered
78-1152 and 78-1880 regarding captioned matter.

SYNOPSIS AND DETAILS: By memorandum dated 3/2/79, captioned
as above, Legal Counsel Division
reported recent developments in captioned matter to the
Director, including a request from the Appellate Section, Civil
Division, Department of Justice (DOJ), for the Bureau's
recommendation with respect to a proposed motion to recuse
presiding Judge Walter Ely.

By letter dated 3/2/79, from the Director to
Ms. Barbara A. Babcock, Assistant Attorney General, Civil
Division, DOJ, we concurred that the DOJ should move to recuse
Judge Ely.

By letter dated 4/10/79, from Ms. Linda Cole,
Attorney, Appellate Staff, Civil Division, DOJ, to SA John C.
Hall, Legal Counsel Division, this Bureau was advised of Judge
Ely's decision to recuse himself from further participation in
appeals numbered 78-1152 and 78-1880 regarding captioned
matter. Ms. Cole also enclosed therewith a copy of a letter

ENCLOSURE

- 1 - [redacted] (Enc.)
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1 - IPALU

REC-2

EX-124 (CONTINUED - SEE OVER)

11 MAY 11 1979

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JAB:cmw

2 JUN 1979

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

FBI/DOJ

Memo Legal Counsel
To The Director

from Judge Ely to Ms. Babcock, dated 3/30/79 (copy attached),
expressing his appreciation for the manner in which the recusal
was handled.

RECOMMENDATION:

None, for information.

APPROVED <i>[Signature]</i>	Adm. Serv. _____	Legal Coun. <i>[Signature]</i>
<i>WES</i>	Crim. Inv. _____	Plan. & Insp. _____
Director <i>[Signature]</i>	Ident. _____	Rec. Mgmt. _____
Assoc. Dir. <i>[Signature]</i>	Intell. _____	Tech. Servs. _____
Dep. AD Adm. <i>[Signature]</i>	Laboratory _____	Training _____
Dep. AD Inv. _____		Public Affs. Off. _____

Enclosure

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

March 30, 1979

THE HONORABLE BARBARA ALLEN BABCOCK
Assistant Attorney General
United States Department of Justice
Washington, D.C. 20530

RE: EXNER v. FEDERAL BUREAU OF INVESTIGATION, ET AL.
Nos. 78-1152, 78-1880

Dear Ms. Babcock:

On the day before yesterday, March 28th, I flew to San Francisco to attend to some official duties there. Before leaving Los Angeles, I had advised two of our judges, by telephone, of my intention to direct that all communications pertaining to the issue of my recusal in appeal No. 78-1152 be filed. Later in the day, in a telephone call, I was advised that my copy of the "MOTION TO RECUSE" had been received in my Los Angeles office. That copy of the Motion did not contain the attachments. The attachments were, however, included with the Original of the Motion, which was filed in San Francisco; thus, the original Motion and the attachments were readily available for my reading there..

I am glad that you filed the Motion, and I am grateful for the respectful tone of your covering letter to me, dated March 27, 1979.

As I have said before, I appreciate the courtesy of Mr. Egan, as I appreciate the courtesy of the letter written to me by Mr. Leonard under date of March 21, 1979.

The letter that you wrote to me on March 27th indicates a justifiable misapprehension on your part. It was never intended that our full Court, or any judge other than myself, should decide the issue of my recusal. While Mr. Egan's writing to me directly on March 9, 1979 constituted a violation of our Court's Local Rule 1, all acknowledge that, in writing that letter, Mr. Egan was motivated by the

62-116929-36X4

197-900-5
ENCLOSURE

... great consideration of courtesy. Thus, I cannot conscientiously fault him. I am more inclined to fault myself for my own impulsive mistake in telephoning Mr. Egan without advising Mr. Leonard in advance and without inviting Mr. Leonard to being privy, in a conference telephone call, to the telephone exchange between Mr. Egan and me. Now, however, there has been a full disclosure to Mr. Leonard of the thrust of that telephone conversation.

Next, I call your attention to the one obvious mistake in the affidavit of Mr. Stoll, attached to your "MOTION TO RECUSE". On the 8th line of page 2 of Mr. Stoll's affidavit, the word "witness" should be "widow". Mr. Stoll's mistake is quite understandable, since our recording equipment is by no means perfect and its imperfection in recording my comments is doubtless aggravated by my "Texas accent". In any event, I suggest that Mr. Stoll should again listen to the recording in the light of the context of the colloquy and file a brief amending affidavit substituting "widow" for "witness" at the specified place.

Today, I am forwarding an Order to San Francisco for filing. The Order grants your Motion that I recuse myself from participation in any further proceedings in connection with appeal No. 78-1152, the appeal to which your Motion was directed. By my Order, I also recuse myself from further participation in the consolidated appeal, No. 78-1880.

My Order eliminates the need for Mr. Leonard to file an opposition to your "MOTION TO RECUSE", and I hereby direct Mr. Leonard that he not file a response to the Motion.

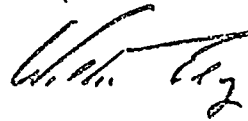
Finally, and so that the record will be absolutely complete, I am directing our Court's Clerk to file a copy of this letter. No further communications between the parties and the Court should now be necessary.

I reiterate my satisfaction over your decision to file the "MOTION TO RECUSE". I could not have taken action upon the basis of Mr. Egan's informal letter of March 9th without bringing its contents to the attention of my colleagues and causing it, together with all other correspondence pertaining to the issue of my recusal, to be filed.

The Honorable Barbara Allen Babcock
March 30, 1979
Page Three

It is because of my belief, a belief that your Department
apparently shares, as indicated by the filing of your
motion, that no Court, or a judge thereof, should issue a
significant Order affecting the Court's operation or the
interest of litigants without a court recordation of the
foundation of the Order.

Yours very truly,



WALTER ELY

WE:uk

cc: Associates
Honorable Harry Pregerson
Clerk Emil Melfi
Richard C. Leonard, Esq.
Honorable Michael J. Egan
Leonard Schaitman, Esq. ✓



UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

April 10, 1979

Address Reply to the
Division Indicated
and Refer to Initials and Number

LMC:wm
145-12-2683

TELEPHONE:
(202) 633-3525

145-12-2683
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[Redacted] Esquire
F.B.I. Academy
Legal Division
Quantico, Virginia 22135

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Re: Judith Katherine Exner v. Federal Bureau of
Investigation (C.A. 9, No. 78-1152 and 78-1880)

Dear [Redacted]

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I am enclosing copies of our most recent submissions to the Ninth Circuit so that you can bring your file on the Exner case up to date. As you can see from the enclosures, the Associate Attorney General originally decided to handle the recusal issue in a manner which differed from our recommendations. However, a formal motion was eventually filed and Judge Ely had indicated that he will disqualify himself from further participation in both appeals.

After the Exner case was argued and submitted, both the First and Fourth Circuits issued favorable decisions on the scope of the F.B.I.'s exemptions from the access provisions of the Privacy Act. We have transmitted copies of both decisions to the Clerk of the Court with a request that they be distributed to the panel. Copies of the decisions and our transmittal letters are enclosed.

I would like to take this opportunity to thank you for your cooperation throughout the appellate proceedings in this case. I will keep you apprised of any future developments.

Very truly yours, SEP 26 1990

Linda M. Cole

Linda M. Cole
Attorney, Appellate Staff

2-ENCLOSURE

Enclosures

b6

Cole

March 30, 1979

LMC:wm
145-12-2683

TELEPHONE:
(202) 633-3525

Mr. Emil E. Melfi, Jr.
Clerk, United States Court of Appeals
for the Ninth Circuit
Post Office Box 547
San Francisco, California 94101

Re: Judith Katherine Exner v. Federal Bureau
of Investigation (C.A. 9, No. 78-1152 and
78-1880)

Dear Mr. Melfi:

The above-captioned appeals were argued and submitted on February 12, 1979. On March 27, 1979, the United States Court of Appeals for the First Circuit issued a decision which squarely addresses the issue which is now pending before this Court in Appeal No. 1152. Irons v. Bell, No. 78-1350 (March 27, 1979).

In accordance with Local Rule 1, we are enclosing sufficient copies of the First Circuit's opinion for distribution to the panel. We would ask the panel to consider pages 4 and 5 of the First Circuit's decision in connection with the arguments presented at pages 14-21 of our principal brief.

Thank you for your assistance.

Very truly yours,

Linda M. Cole
Attorney, Appellate Staff
Civil Division

Enclosures

cc: Richard C. Leonard, Esquire
Suite 1200
433 North Camden Drive
Beverly Hills, California 90210

62-116929-3615
ENCLOSURE

Cole

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUDITH KATHERINE EXNER,

Plaintiff-Appellant,

v.

No. 78-1152

FEDERAL BUREAU OF INVESTIGATION,
WILLIAM H. WEBSTER, Director,
Federal Bureau of Investigation,
UNITED STATES DEPARTMENT OF JUSTICE
and GRIFFIN B. BELL, Attorney General
of the United States,

Defendants-Appellees.

MOTION TO RECUSE

TO THE HONORABLE JUDGE WALTER ELY:

Defendants, the Federal Bureau of Investigation, William H. Webster, the Department of Justice and Griffin B. Bell, respectfully submit this motion that Your Honor recuse himself from further participation in Appeal No. 78-1152.^{1/}

Defendants base this motion upon facts which came to their attention as a result of comments made at the February 12,

1/ The Appeal in No. 78-1152 concerns the extent to which the FBI can exempt files compiled for law enforcement purposes from the access provisions of the Privacy Act. It was consolidated, by order of this Court, with the Appeal in No. 78-1880 which deals with the standards for awarding attorneys' fees under the Freedom of Information Act. Although the two appeals stem from the same lawsuit and involve the same parties, the legal issues are wholly different. The appearance of lack of impartiality is directly raised only in Appeal No. 78-1152. Accordingly, defendants do not request Your Honor to recuse himself from participation in the disposition of Appeal No. 78-1880.

1979 oral argument in the above-captioned case.^{2/} Defendants respectfully request Your Honor to consider these newly discovered facts in light of the recent amendment to the recusal statute and to grant the instant motion because, in light of those facts, your "impartiality might reasonably be questioned." 28 U.S.C. 455(a). We believe that it is our duty to file the instant motion in order to vindicate the important public policies which underlie the recusal statute and to provide Your Honor with the protections which the statute was designed to afford federal judges.^{3/}

^{2/} Immediately after returning to Washington, D.C., the appellate attorney who argued this case for the government brought these comments to the attention of her review officer. The Department of Justice then took steps to obtain a transcript of the relevant portions of the oral argument. The Department also requested the FBI to review the files which are the subject of this lawsuit in light of the comments made at the oral argument. The transcript, the results of the FBI search, and a draft motion were then submitted to the Director of the FBI, the Assistant Attorney General for the Civil Division and the Associate Attorney General for a determination as to whether the Department should ask Your Honor to recuse himself.

^{3/} Because the motion is based in part upon facts which came to the government's attention after the oral argument, the Associate Attorney General decided that, as a courtesy, he would make those facts available to Your Honor in advance of filing the motion for whatever response Your Honor might wish to make. Accordingly, by letter of March 9, 1979, the Associate Attorney General sent Your Honor a letter stating that the name of Your Honor's former law firm does in fact appear in the files which are the subject of this lawsuit. A copy of that letter was sent to opposing counsel. Subsequently, Your Honor telephoned the Associate Attorney General to request additional factual information. The Associate Attorney General then sent a follow-up letter providing the information requested. A copy of that letter was also sent to opposing counsel. Both Your Honor and the Department of Justice sent opposing counsel a letter describing the substance of the telephone contact which did occur. At that point, opposing counsel submitted a letter expressing a desire to file a written opposition to Your Honor's recusal. After receiving that letter, the Department filed the instant motion. Copies of all correspondence pertaining to the issue of recusal are attached hereto.

The Newly Discovered Facts

This case involves the efforts of plaintiff Judith Katherine Exner to obtain documents from the Central Records System of the Federal Bureau of Investigation which contain references to her. Because the Privacy Act contains broad exemptions for law enforcement agencies and for law enforcement files, the FBI processed Mrs. Exner's request solely under the Freedom of Information Act. Pursuant to the latter statute, the FBI released over two hundred pages to Mrs. Exner. The FBI withheld additional material on the grounds that its release would invade the privacy of persons other than Mrs. Exner who were also named in the documents. The district court examined all of the disputed material in camera and upheld both the FBI's reading of the exemptions to the Privacy Act and its invocation of the exemption to the Freedom of Information Act which pertains to clearly unwarranted invasions of personal privacy. Plaintiff appealed the district court's ruling on the Privacy Act and the government cross-appealed from the court's award of attorneys' fees to plaintiff.

The case was fully briefed and orally argued on February 12, 1979, before a panel of this Court consisting of Your Honor, Circuit Judge Wallace and District Judge Pregerson. The instant motion to recuse stems from comments made by Your Honor at the oral argument. As noted on page five of the government's main brief on the appeal, over 95% of the disputed material in this case came from files which were compiled during the anti-racketeering investigation of John

Roselli. Twice during oral argument, Your Honor commented that he had been John Roselli's lawyer.^{4/} In addition, both Judge Wallace and Your Honor requested government counsel to advise the Court of the location of the in camera exhibit which was submitted to the district court but which was not designated as part of the record on appeal.^{5/} See the attached affidavit of George C. Stoll which contains a transcription of the relevant portions of the oral argument.^{6/}

Because Your Honor's comments raised the possibility that your name might appear in the very files which are the subject of this appeal,^{7/} the Department of Justice immediately asked the FBI to ascertain whether or not this situation did exist. The attached affidavit of John F. Loome indicates that the name of Your Honor's former law firm (Ely, Kadison and Quinn) does appear both in the portions of

^{4/} By filing this motion, the government, of course, does not suggest any impropriety whatsoever in Your Honor's hearing oral argument in the first place. This motion is based solely upon (1) comments which were obviously evoked as a spontaneous response to the colloquy at oral argument and (2) the FBI's post-argument examination of the files in question.

^{5/} Earlier during the argument, Judge Wallace raised the question of the location of the documents.

^{6/} Mr. Stoll's affidavit at one point refers to "Rosetta" rather than "Roselli." However, it is clear from the context that John Roselli was the individual under discussion. We have also been advised that the word "intelligible" was inadvertently typed in the affidavit instead of the correct "unintelligible."

^{7/} At the oral argument, Your Honor stated: "I hope it doesn't have any reference to me because I represented one of the plaintiffs in an isolated matter. . . ."

the Roselli files from which the documents pertaining to Mrs. Exner were drawn and in the actual in camera exhibit itself.

The Amendment To The Recusal Statute

In 1974, Congress amended the recusal statute to provide that "[a]ny justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. 455(a). The legislative history demonstrates that Congress amended the statute in order to protect federal judges from "uncertain language [which] has had the effect of forcing a judge to decide either the legal issue or the ethical issue at his peril" and to "promote public confidence in the impartiality of the judicial process by saying, in effect, if there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify and let another judge preside over the case." H. Rep. No. 93-1453, 93d Cong., 2d Sess. 2, 5 (1974), reprinted in 1974 U.S. Code Cong. and Admin. News at 6352 and 6355.

Thus, the post-1974 test for recusal is not whether the judge could, as a subjective matter, decide the case with impartiality. The test is whether, under the circumstances, a reasonable man might question the judge's ability to do so. Davis v. Board of School Commissioners, 517 F. 2d 1044, 1052 (5th Cir. 1975), rehearing denied, 521 F. 2d 814 (1975), certiorari denied, 425 U.S. 944 (1976). Indeed, under the amended statute, the "appearance of

impartiality is virtually as important as the fact of impartiality." Webbe v. McGhie Land Title Co., 549 F. 2d 1358, 3161 (10th Cir. 1977).

The Recusal Statute as Applied to the Instant Case

The fact that the name of Your Honor's law firm (Ely, Kadison and Quinn) appears in the very files which are at issue in this case places Your Honor's personal interests at the very center of the appeal in No. 78-1152. On the one hand, Your Honor's position can be directly analogized to that of the plaintiff. The district court found that Mrs. Exner's name appears throughout the Roselli files on a sporadic and incidental basis. The Loomer affidavit shows that Your Honor's law firm also appears in those files on two occasions. At the oral argument, Your Honor noted that he had been John Roselli's lawyer. It appears, therefore, that Your Honor, like the plaintiff, may have a substantial interest in access to those files. On the other hand, Your Honor's position is directly analogous to the position of the third parties whose interests the government has tried to protect by withholding documents from Mrs. Exner under Exemption b(7)(C) to the Freedom of Information Act. The Loomer affidavit establishes that the name of Your Honor's former law firm appears in one of the actual documents which was withheld from the plaintiff and which was submitted to the district court for in camera review. Thus, were the plaintiff to prevail on this appeal, she will in fact obtain a direct reference to Your Honor's firm. It thus appears that no matter how Your Honor decides this case, it could

reasonably be contended that he has allowed his personal interests to influence his actions. If Your Honor rules for plaintiff, it can be asserted that he has vindicated his own right of access. If Your Honor rules for the government, it can be asserted that he has protected his own privacy.

In our view, therefore, this case fits squarely within the language and spirit of the recusal statute since this is a case in which Your Honor's "impartiality might reasonably be questioned." 28 U.S.C. 455(a). The remedy of recusal provided by the statute must therefore be applied in order to protect the reputation of the federal judiciary and to afford Your Honor the protection which the recusal statute was designed to provide federal judges.

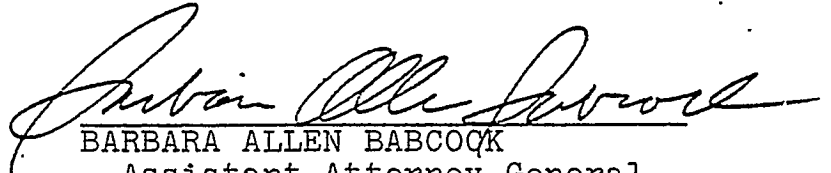
There is an additional consideration which lends further, independent, support to the motion to recuse. As noted above, at the oral argument, Judge Wallace and Your Honor expressed an interest in the in camera exhibit. If Your Honor, as a private citizen, had submitted a request for references to himself or his law firm contained in the in camera exhibit, that request would most probably have been denied by the FBI on the same grounds as it denied access to Mrs. Exner.^{8/} If the panel of which Your Honor is a member should, in deciding the instant appeals, seek in camera inspection of


8/ The FBI would certainly have denied access under the Privacy Act in accordance with Exemptions (j)(2) and (k)(2) and the implementing regulations. The FBI would also have limited access under the Freedom of Information Act in accordance with Exemption b(7)(C) to the extent necessary to protect third parties from any "clearly unwarranted invasions of personal privacy."


the documents, Your Honor would be provided materials in his judicial capacity which might have been withheld from him in his personal capacity. Any appearance that a judge has used his office to gain a personal advantage must be avoided.

For the foregoing reasons, defendants respectfully request Your Honor to recuse himself from further participation in appeal No. 78-1152.

Respectfully submitted,


BARBARA ALLEN BABCOCK
Assistant Attorney General,


LEONARD SCHAITMAN (202) 633-3321


LINDA M. COLE (202) 633-3525
Attorneys,
Civil Division,
Department of Justice,
Washington, D.C. 20530.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUDITH KATHERINE EXNER,

Plaintiff-Appellant,

v.

No. 78-1152

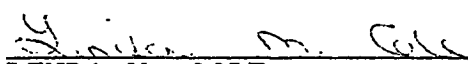
FEDERAL BUREAU OF INVESTIGATION,
WILLIAM H. WEBSTER, Director,
Federal Bureau of Investigation,
UNITED STATES DEPARTMENT OF JUSTICE,
and GRIFFIN B. BELL, Attorney General
of the United States,

Defendants-Appellees.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March, 1979, I
caused the foregoing Motion To Recuse to be served upon counsel
for Plaintiff-Appellant, by mailing a copy, postage prepaid,
to:

Richard C. Leonard, Esquire
Suite 1200
433 North Camden Drive
Beverly Hills, California 90210


LINDA M. COLE
Attorney.

A T T A C H M E N T S

Assistant Attorney General
Appellate Staff, Civil Division
Attention: Ms. Linda M. Cole
Room 3610 FEDERAL GOVERNMENT
Assistant Director - Legal Counsel
Federal Bureau of Investigation

February 22, 1980

2 - [redacted] (Enc.)

Attn: [redacted]
Attn: [redacted]

1 - [redacted] (Enc.)
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1 - IPALU

JUDITH KATHERINE EXNER
v. FEDERAL BUREAU OF INVESTIGATION, et al.
(U.S.D.C., S.D. CAL.)

CIVIL ACTION NUMBER 76-398

NINTH CIRCUIT COURT OF APPEALS NUMBERS 78-1152 and 78-1880

3

Reference is made to your memorandum dated February 11, 1980 (your reference: LS:LMCole:wm, 145-12-2683), and the telephone conversation of February 20, 1980, between Ms. Linda M. Cole of your office and Special Agent (SA) [redacted] of this Bureau's Legal Counsel Division.

Pursuant to the above, and in view of the Ninth Circuit Court of Appeals affirmation of the District Court's award of attorneys' fees to plaintiff in captioned matter, we strongly recommend that your office file a petition for rehearing, and preferably, for rehearing en banc. If such a petition is denied or if the Court of Appeals will not reverse itself, we also recommend that a petition for a writ of certiorari be filed with the Supreme Court.

It is this Bureau's opinion that the District Court's ruling, and the Court of Appeals' affirmation thereof, that plaintiff "substantially prevailed" in captioned matter and is entitled to attorneys' fees simply because she received expedited treatment of her Freedom of Information Act (FOIA) request by court order, is a blatant misapplication of the FOIA's attorneys' fees provision and clearly unsupported by case law and the Act's legislative history. See, e.g. S.Rep. No. 93-354, 93d Cong., 2d Sess. 17 (1977); Cox v. United States Department of Justice, 601 F.2d 1 (D.C. Cir. 1979); Olaguebeet A. Lopez Pacheco v. Federal Bureau of Investigation, Civil Action Number 76-83 (D.P.R. January 10, 1980) (copy attached), and citations therein.

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Asst. Dir.: _____
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Director's Sec'y _____

MAIL ROOM ☒

SEE NOTE PAGE 2

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CN61

Assistant Attorney General
Appellate Staff, Civil Division

Additionally, we believe that such an interpretation would have an extremely chilling effect on all Government agencies in FOIA cases wherein a plaintiff receives expedited treatment, whether it be court ordered or otherwise.

It is this Bureau's interpretation of the FOIA's attorneys' fees provision, based upon case law and the Act's legislative history, that such fees may be awarded to a plaintiff in an FOIA action only where a defendant agency has "improperly withheld" documents from the plaintiff. Such a factual situation does not exist as to plaintiff, as her FOIA lawsuit did not bring about the disclosure of information to her which would not have been made available to her in the absence of the suit. Simply stated, had plaintiff not initiated her lawsuit, she would have received the same information, only not on an expedited basis. No documents were improperly withheld from plaintiff as is clearly supported by the record in captioned matter. Thus, there was no substantial causal relationship between the result of plaintiff's lawsuit and what she originally sought pursuant to her FOIA request; and, therefore, she did not "substantially prevail" in captioned matter and should not be entitled to an award of attorneys' fees.

Should you require additional information and/or assistance concerning captioned matter, please contact SA [] to whom it is currently assigned, at (202) 324-5662.

Enclosure

NOTE: Copy of referenced memorandum and of Court of Appeals opinion attached hereto for Bureau personnel only. Views sought by DOJ in paragraph three of referenced memorandum orally furnished to Ms. Cole on 2/20/80, by Legal Counsel Division. Prior history of captioned matter set forth at 542 F.2d 1121 (9th Cir. 1976) and 443 F.Supp. 1349 (S.D. Cal. 1978).

APPROVED:

Director _____
Exec. AD-Adm. _____
Exec. AD-Asst. _____
Exec. AD-LES _____

Adm. Serv. _____
Crim. Inv. _____
Ident. _____
Intell. _____
Laboratory _____

Legal Coun. *m* _____
Plan. & Insp. _____
Rec. Mgmt. _____
Tech. Servs. _____
Training _____
Public Affs. Off. _____

Thus, after an overall assessment of the particularities of this action what can be gleaned is: first, that it^{is}/questionable that this civil suit was needed for substantial compliance on the part of the agency; second, that no bad faith can be attributed to the agency in either the delay between the request and the disclosure or the invocation of the defenses to disclosure; and third, the fact the Defendants did prevail on these defenses demonstrates that "the Government's withholding of the records sought /had/ a reasonable basis in law."

Nationwide Building Maintenance, supra, p. 711

For all the above cited reasons we find that no award of attorney's fees is warranted in the present action and this request is accordingly, DENIED.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 10th day of January, 1980.



JUAN E. TORRUELLA
U. S. DISTRICT COURT JUDGE

that an award of attorney's fees is warranted in this case. Although we recognize that Plaintiff has vigorously litigated his claims throughout the proceedings, he has nevertheless failed to show that he has "substantially prevailed" in his claims before this Court.

While it is true that the courts have not required a court order or judgment compelling disclosure in order to find that a party has prevailed,^{4/} it is equally true that a substantial causal relationship must be shown between the result of the suit and what was originally sought. It must appear that Plaintiff could not have obtained substantial compliance with his request if it were not but for his suit. This must necessarily follow if there is to be a finding that a Plaintiff did indeed "substantially prevail." As we have noted before, Defendants substantial compliance with their obligation under the Act came only some six to seven months after the initial request for disclosure was made.^{5/} Moreover, a significant amount of disclosure was had administratively,^{6/} when this civil action was still very much in its incipient stage. As to those documents that remained in controversy the claimed exceptions were upheld by this Court; see 470 F. Supp. 1091, and our subsequent Opinion and Order of July 31, 1978.^{7/}

^{4/} See esp.: Nationwide Building Maintenance, Inc., supra and Cureo v. Rumsfeld, 553 F. 2d 1360 (C.A.D.C. 1977).

^{5/} In this respect, we are not unmindful that the F.B.I. is one of the agencies with the greatest volume of requests under the F.O.I.A. See Open America v. Watergate Special Prosecution Force, 547 F. 1d 605 (C.A.D.C., 1976).

^{6/} To this end this action was stayed pending administrative exhaustion. See note 2 supra. In this respect the fact that these documents were provided administratively is some indication that no bad faith was involved on the part of the agency in processing the request.

^{7/} We should also mention that what was adjudicated in summary judgment was for the most part a dispute on excisions from the documents and not an outright denial of complete documents held by the F.B.I.

This Section was added to the F.O.I.A. and the F.O.I.P.A. by the 1974 Amendment with intention of providing compensation to private persons for their assistance to the general public in bringing the government to comply with the national policy favoring disclosure of government documents and in this way encourage prompt and good faith compliance by the administrative agencies with their duties under the Act. S.Rep. No. 93-854, 93d Cong., 2d Sess. 17(1977); Cox v. United States Department of Justice, 601 F. 2d 1 (D.C.Cr., 1979).

An award of attorney's fees is never automatic. First and foremost the Court must determine that the plaintiff has "substantially prevailed." s552(a)(4)(E). Moreover, this determination involves an exercise of sound discretion of the Court which takes into account the particular facts of each individual case. In reaching this decision, the Court is guided by several factors, among these: (1) whether the prosecution of Plaintiff's claim could reasonably be regarded as necessary; (2) whether his suit had a substantial causative effect on the delivery of the information; (3) the benefit to the public, if any, derived from the suit, (4) the nature of the complainant's interest in the released information, and (5) whether the agency's withholding of the record had a reasonable basis in law.^{3/}

After a careful examination of 5 U.S.C.s552(a)(4)(E), and the above enumerated factors against the particular circumstances of this case, we find that they fail as a whole, to demonstrate

^{3/} Several factors are taken from the original Senate version of what is now Section 552(a)(4)(G). The others are taken from different cases which have previously discussed this same matter. See e.g. Nationwide Building Maintenance Inc. v. Sampson, 599 F. 2d 704 (C.A.D.C. 1977) and Vermont Low Income Advocacy Council v. Dunlop, 71 F.R.D. 344 (D. Vt.) aff'd sub nom., Vermont Low Income Advocacy Council v. Usery, 546 F. 2d 509 (C.A. 2 1976). As Nationwide Building, supra, teaches, neither one factor is exclusive or is individually dispositive of the issue, nor is this list of factors exhaustive.

complaint before this Court seeking Defendants' compliance under the F.O.I.A.

On March 11, 1976 Defendants released 111 pages of documents. Shortly thereafter this case was stayed pending exhaustion of administrative remedies.^{2/} As a result of these further administrative proceedings, on November 1, 1977, 84 additional pages were released. Plaintiff filed an amended complaint on February 8, 1978 to obtain release of all requested documents still withheld. A second amended complaint was filed on June 1, 1978.

By way of summary judgment, we disposed of all the controversies raised by the amended complaint: Plaintiffs' Motion for in camera inspection was denied; all of the exemptions claimed by Defendants under 5 U.S.C. ss 552(b)(7)(c); 552(b)(7)(D); and 552(b)(1) were sustained; Plaintiffs' request for amendment of record was dismissed; and Plaintiffs' request of all documents originating with the F.B.I's Counter Intelligence Program relating to groups and individuals seeking independence for Puerto Rico was denied. Plaintiff did succeed in obtaining release of his photograph in Defendants' records, which Defendants originally denied they had, and successfully obtained release of 11 additional pages of documents originating with other federal agencies which Defendants initially refused to release.

The Freedom of Information Act, ("F.O.I.A."), 5 U.S.C. s552(a)(4)(E) and the Freedom of Information and Privacy Act ("F.O.I.P.A."), 5 U.S.C. s552a(g)(3)(B), both provide that:

"The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed."

2/

See our Order of March 30, 1976.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

OLAGUIBEET A. LOPEZ PACHECO
et al

Plaintiffs

v.

) CIVIL NUMBER: 76-8

FEDERAL BUREAU OF INVESTIGATION,
et al

Defendants

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U.S. DISTRICT COURT
SAN JUAN, P.R.

DECISION AND ORDER

In our previous Opinions and Orders ^{1/} we disposed of all controversy on the merits pending in this case. Plaintiff has now reinstated his Motion for Attorney's fees and Defendants adhere to their opposition previously filed before the Court.

The facts underlying this Motion are as follows: On July 6, 1975, Plaintiff filed a request under the Freedom of Information Act, ("FOIA"), 5 U.S.C. s552(a)(4)(E), with Defendants to obtain copy of the entire record of himself and his deceased son prepared by Defendants in relation with the investigation of the events and circumstances surrounding his son's death. On July 10, 1975 Defendants replied that they would comply with this request within the next 45 working days. On September 30, 1975 Defendants requested Plaintiff's notarized signature in order to release the documents. This signature was immediately provided by Plaintiff. Further inquiry was made on December 12, 1975 as to the status of the request for the documents. Because the requested documents had not been received by January 23, 1976 Plaintiff filed a

1/

See: 470 F. Supp. 1091 (1978) and the Opinion and Order of July 31, 1979.

62-116929-37
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U.S. DISTRICT COURT
SAN JUAN, P.R.

ENCLOSURE

February 11, 1980

Leonard Schaitman

Appellate Staff, Civil Division

Department of Justice

Exner v. Federal Bureau of Investigation

(C. A. 9, No. 78-1880)

LS:LMCole:wr

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b7C

Legal Counsel Division
Federal Bureau of Investigation

I am enclosing for your review a recent decision of the United States Court of Appeals for the Ninth Circuit which sets unfavorable precedent under the attorney's fees provision of the Freedom of Information Act. We are presently considering whether to file a petition for rehearing and a suggestion for rehearing en banc; we may ultimately have to consider whether to file a petition for a writ of certiorari. Your comments will help us to ascertain the extent to which the Ninth Circuit's decision adversely affects the government.

Briefly, the district court awarded attorney's fees to the plaintiff even though it had upheld every single one of the government's claimed exemptions. The court theorized that the plaintiff had "substantially prevailed" within the meaning of 5 U.S.C. §552(a)(4)(E) because she had obtained a judicial order directing the F.B.I. to process her request ahead of the prior requests of other individuals. The government appealed, contending, inter alia, that an FOIA litigant cannot substantially prevail within the meaning of the fee provision unless (s)he obtains some sort of disclosure which the government would not otherwise have made. A copy of the government's brief is attached. The Ninth Circuit affirmed the decision of the district court as a factual finding which withstood review under the clearly erroneous standard.

We would appreciate your comments on all aspects of the decision. However, we are particularly interested in your views on (1) the extent to which government agencies find it impossible to comply with the time limits of the FOIA and resort to processing requests on a first-in-first-out basis, (2) the extent to which the courts have been ordering government agencies to process certain FOIA requests ahead of others, and (3) the extent to which such court orders disrupt an agency's ability to process all FOIA requests in the most efficient possible manner.

Please send your comments to Linda M. Cole, Room 3610, Appellate Staff, Civil Division, Department of Justice, Washington, D. C. 20530. You may also telephone Mrs. Cole at 633-3525. Thank you for your cooperation.

FILED

UNITED STATES COURT OF APPEALS

FEB 4 1980

FOR THE NINTH CIRCUIT

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

JUDITH KATHERINE EXNER,

Appellant,

v.

FEDERAL BUREAU OF INVESTIGATION,
WILLIAM H. WEBSTER, Director, Federal
Bureau of Investigation, UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
and GRIFFIN B. BELL, Attorney General
of the United States,

Appellees.

No. 78-1152

JUDITH KATHERINE EXNER,

Appellee,

v.

FEDERAL BUREAU OF INVESTIGATION,
WILLIAM H. WEBSTER, Director, Federal
Bureau of Investigation, UNITED STATES
UNITED STATES DEPARTMENT OF JUSTICE
and GRIFFIN B. BELL, Attorney General
of the United States,

Appellants.

No. 78-1880

OPINION

Appeal from the United States District Court
for the Southern District of California
Edward J. Schwartz, Chief Judge, Presiding
Argued February 12, 1979
Panel reconstituted, submitted on briefs and record,
April 19, 1979

Before: GOODWIN, WALLACE and PREGERSON*, Circuit Judges.
GOODWIN, Circuit Judge:

Judith Katherine Exner sued the Federal Bureau of
Investigation under the Freedom of Information Act,
5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, to

*The Honorable Harry Pregerson, now a member of this court,
was United States District Judge for the Central District
of California, sitting by designation when this case was
submitted.

62-46929-37

1 obtain access to the information about her in the Bureau's
2 files. While the case was pending in the district
3 court, and during the time consumed by an earlier appeal to
4 this court,¹ the FBI released to Mrs. Exner some 86
5 documents, in whole or part, of a total of 92 documents
6 identified by the FBI as responsive to her request. The
7 district court denied Mrs. Exner's request for an order to
8 produce the remaining six documents, but allowed her
9 attorney's fees and costs upon a finding that she had
10 "substantially prevailed" under the Freedom of Information
11 Act, 5 U.S.C. § 552(a)(4)(E). Both parties appeal.

12 The factual background of the case has been published
13 in the decisions cited in the margin. The legal questions
14 are (1) whether Mrs. Exner, whose appeal is not based on
15 the FOIA, is entitled under the Privacy Act to disclosure
16 of certain remaining documents in the possession of the
17 FBI; and (2) whether the district court properly awarded
18 Mrs. Exner attorney's fees and costs under the FOIA.

19 Both the FOIA and the Privacy Act provide for access
20 to records maintained by agencies of the United States.
21 The FOIA contemplates public access to any and all records
22 not exempt from disclosure. The Privacy Act provides for
23 access by an individual to government records concerning
24 that individual and not exempt from access under specified
25 circumstances.

26 The trial court, before granting summary judgment,
27 examined the unreleased documents in chambers as a court
28 may do under the FOIA (5 U.S.C. § 552(a)(4)(B)). A more
29 limited procedure appears in the Privacy Act. (5 U.S.C.
30 § 552a(g)(3)(A)).
31
32

1 After the examination pursuant to the FOIA, the trial
2 court made findings which, under both the FOIA and Privacy
3 Acts, made the contested documents exempt from release to
4 anyone not authorized by the FBI to see them.

5 The court accordingly ruled that Mrs. Exner was
6 entitled to no further releases of documents under either
7 statute. Her appeal challenges only the court's interpre-
8 tation of the Privacy Act. Technically, therefore, we have
9 no need to consider the FOIA further, except as that
10 statute provided the basis for the court's award of attor-
11 ney fees. The FOIA is, however, tied into the Privacy Act
12 in certain of Mrs. Exner's arguments on appeal, and there-
13 fore will be considered in that connection.

14 I. THE PRIVACY ACT

15 Subsection 552a(d) of the Privacy Act permits an
16 individual² to gain access to those records³ which per-
17 tain to him and are found in a system of records⁴ main-
18 tained by an agency.

19 Having given general access to the individual in
20 552a(d), Congress in subsection 552a(j)(2) denied access to
21 any system of records which is "maintained by an agency or
22 component thereof which performs as its principal function
23 any activity pertaining to the enforcement of criminal laws
24 * * * and which consists of * * * (B) information compiled
25 for the purpose of a criminal investigation, including
26 reports of informants and investigators, and associated
27 with an identifiable individual * * * ."

28 To exempt a system of records from access under the
29 Privacy Act, an agency must, first, promulgate rules, pur-
30 suant to the rulemaking requirements of 5 U.S.C.
31
32

1 §§ 553(b)(1), (2), and (3)(c) and (e), and, second, state
2 the reasons in the rule itself why the system of records is
3 to be exempt from a provision of the Act. 5 U.S.C.

4 § 552a(j). The Justice Department takes the position that
5 it has fully complied with both requirements. See
6 28 C.F.R. § 16.91. The trial court agreed, and we affirm.

7 In her amended complaint, Mrs. Exner indicated that
8 she sought access under the Privacy Act because, once she
9 obtained access to her records, the Privacy Act would give
10 her the opportunity to correct what she believed to be
11 inaccurate information in the FBI's files. She contends on
12 appeal that if she cannot inspect the remaining FBI records
13 not previously released to her she cannot correct them.
14 This is true, but it is not necessarily controlling.
15 First, she must establish the right to see the withheld
16 records.

17 The scope of our review of the district court's deci-
18 sion exempting 6 of the 92 documents from disclosure is
19 two-sided. First, we agree that the trial court's percep-
20 tion of the facts withstands review under Fed. R. Civ.
21 P. 52. The trial court found, as a fact, that the withheld
22 documents were part of a criminal investigation report in
23 an exempt system of records. This finding is virtually
24 conceded. Next, we must decide whether the trial court
25 applied the correct legal standard.

26 The only Privacy Act exemption cited by the district
27 court is the one contained in section 552a(j)(2)⁵.

28 The Department of Justice regulations found in
29 28 C.F.R. § 16.96 activate the exemptions with respect to
30 four different systems of records: the Central Records
31 System, the Electronic Surveillance Indices, the Identifi-
32 cation Division Records System, and the National Crime

1 Information Center. While the trial court's findings do
2 not so specify, the information concerning Mrs. Exner was
3 apparently all found in the Central Records System.

4 Regulation § 16.96(a) provides that the Central
5 Records System is exempt from subsection 552a(d) "to the
6 extent that information in this system is subject to exemp-
7 tion pursuant to 5 U.S.C. § 552a(j) or (k)."⁶ The regu-
8 lation gives as reasons for these exemptions :

9 "[I]ndividual access to records * * *
10 might compromise ongoing investigations, reveal
11 investigatory techniques and confidential in-
12 formants, and invade the privacy of private
13 citizens who provide information in connection
14 with a particular investigation. In addition,
15 exemption * * * is necessary to protect the
16 security of information classified in the in-
17 terest of national defense and foreign pol-
18 icy." 28 C.F.R. § 16.96(b)(2).

15 The district court correctly ruled that the (j)(2)(B)
16 exemption, as implemented by 28 C.F.R. § 16.96(a) and
17 (b)(2), precludes Mrs. Exner from obtaining any further
18 disclosure of the information pertaining to her that has
19 been withheld as exempt.

20 On the face of the (j)(2)(B) exemption and the accom-
21 panying regulation, Mrs. Exner was not entitled to disclo-
22 sure of any of the information concerning her that appears
23 in the FBI files. All the information on Mrs. Exner was
24 contained in criminal investigatory files located in the
25 Central Records System, and regulation section 16.96(a) has
26 activated the (j)(2)(B) exemption with respect to the Cen-
27 tral Records System.⁷

28 Mrs. Exner contends, however, that the district court
29 relied solely on the FOIA, and ignored the Privacy Act,
30 when it ruled that the government could properly withhold
31 those documents and portions of documents it has not volun-
32 tarily turned over to Mrs. Exner. She is wrong. The

1 "Memorandum and Order Granting Motion for Summary Judgment"
2 demonstrates that the district court did in fact consider
3 the Privacy Act and did find that Mrs. Exner was not
4 entitled to any further disclosure under the Privacy Act or
5 under the FOIA.

6 Mrs. Exner argues here that the Privacy Act's
7 investigatory records exemption, set forth at subsection
8 552a(j)(2)(B), should be construed in her case as coexten-
9 sive with the FOIA's investigatory records exemption, set
10 forth in subsection 552(b)(7).⁸ We need not decide in
11 this case whether the Privacy (j) (2) (B) exemption exempts
12 more information from disclosure than does FOIA (b)(7).
13 Upon any reading of either statute, Mrs. Exner has already
14 received at least as much information as she has a
15 statutory right to demand. Accordingly, we can reserve
16 until a time when a case turns upon the question whether
17 her theory is sound.⁹

18 On oral argument a question was raised whether the
19 Privacy Act entitles Mrs. Exner to further disclosure on
20 another ground: given that the information at issue is
21 contained in a system of records (the Central Records
22 System) that may be totally exempted from access under sub-
23 section 552a(j)(2)(B) to the extent that it contains crimi-
24 nal investigatory files, and given that the FBI has promul-
25 gated a regulation, 28 C.F.R. § 16.96(a), that nominally
26 activates the exemption, may the FBI nevertheless not with-
27 hold the information at issue unless the reason for with-
28 holding is consistent with one of the reasons listed in
29 subsection 16.96(b)(2) for exempting the Central Records
30 System from the application of the access provisions? The
31 question, then, is whether the reasons given in the regula-
32 tion limit the exemption.

1 As noted earlier, Privacy Act subsection 552a(j)
2 requires an agency to specify "the reasons why the system
3 of records is to be exempted" when it promulgates a regula-
4 tion exempting the system from the access provisions. The
5 Privacy Act does not indicate the purpose or effect of this
6 requirement. Nor does the statute state that once the
7 agency has promulgated the regulation activating the
8 (j)(2)(B) exemption, the agency may withhold information
9 only if the reason for withholding is consistent with one
10 of the reasons listed in the implementing regulation. We
11 find it unnecessary at this time to explore the meaning of
12 legislative silence on this point because the district
13 court found that the material here had been withheld for
14 reasons consistent with those set out in the implementing
15 regulation. The disputed documents were, thus, exempt
16 under any reading of the statute.

17 Under the Privacy Act, 5 U.S.C. § 552a(g)(3)(A), the
18 court may conduct in camera proceedings only to determine
19 whether the exemptions set forth in subsection (k) are
20 applicable; the Privacy Act does not expressly give the
21 court the right to look at the records to determine whether
22 the exemptions set forth in subsection (j) are applicable.
23 Given this diverse treatment of the different exemptions,
24 we decline to speculate whether Congress, by failing to
25 provide expressly for review of (j)(2)(B) material,
26 intended to preclude such review or merely overlooked the
27 point. Whether or not, in this case, the district court
28 had statutory authority to review any of Mrs. Exner's
29 records, with respect to which the government was claiming
30 the (j)(2)(B) exemption, to determine whether the govern-
31 ment's reasons for withholding those records are consistent
32

1 with the reasons listed in 28 C.F.R. § 16.96(b)(2) for
2 exempting the Central Records System from the access
3 provisions, the court did examine the documents and
4 concluded that they were exempt.

5 This conclusion leaves only the question of attor-
6 ney's fees under 5 U.S.C. § 552(a)(4)(E).

7 II. ATTORNEY'S FEES

8 The plaintiff's right to attorney's fees and costs
9 cannot be considered apart from the procedural history of
10 the case. The decision whether to award attorney's fees
11 under 5 U.S.C. § 552(a)(4)(E) is within the discretion of
12 the district court. Cox v. United States Department of
13 Justice, ____ F.2d ____ (D.C. Cir., June 11, 1979). The
14 trial court, in which this litigation flourished for seve-
15 ral years, made specific findings that withstand review
16 under Fed. R. Civ. P. 52, to the effect that Mrs. Exner
17 "substantially prevailed" under her FOIA claim. The record
18 supports both the findings and the court's conclusions.

19 Affirmed.
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FOOTNOTES:

¹See Exner v. Federal Bureau of Investigation,
443 F. Supp. 1349 (S.D. Cal. 1978), and Exner v. Federal
Bureau of Investigation, 542 F.2d 1121 (9th Cir. 1976).

²Subsection 552a(d) provides in part:

"(1) [U]pon request by any individual to
gain access to his record or to any information
pertaining to him which is contained in the
system, permit him and upon his request, a per-
son of his own choosing to accompany him, to
review the record and have a copy made * * * ."

³The term "record" is defined in subsection
552a(a)(4) as follows:

" * * * [A]ny item, collection, or group-
ing of information about an individual that is
maintained by an agency, including, but not
limited to, his education, financial transac-
tions, medical history, and criminal or employ-
ment history and that contains his name, or the
identifying number, symbol, or other identify-
ing particular assigned to the individual, such
as a finger or voice print or a photograph
* * * ."

⁴The term "system of records" is defined in subsec-
tion 552a(a)(5) as follows:

" * * * [A] group of any records under the
control of any agency from which information is
retrieved by the name of the individual or by
some identifying number, symbol, or other iden-
tifying particular assigned to the individual
* * * ."

5 "Records * * *

"(2) [M]aintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status; (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision."

6 On appeal, the government also relies on the exemption contained in § 552a(k)(2). It provides that an agency head may exempt from the access and amendment requirements a system of records that contains:

"(2) [I]nvestigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2) of this section: Provided, however, That if any individual is denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material, such material shall be provided to such individual, except to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to the effective date of this section, under an implied promise that the identity of the source would be held in confidence * * * ."

It is not necessary in this case to consider this exemption, and we decline to do so.

-b-

1 2
3 7 We do not express an opinion on the documents dis-
4 closed earlier under the FOIA during the course of the
5 litigation. The government has not raised the issue on
6 appeal, and it is moot in any event.
7 -----

8 8 "(b) This section does not apply to
9 matters that are -

10 * * *

11 "(7) investigatory records compiled
12 for law enforcement purposes, but only to
13 the extent that the production of such
14 records would (A) interfere with enforce-
15 ment proceedings, (B) deprive a person of
16 a right to a fair trial or an impartial
17 adjudication, (C) constitute an unwar-
18 ranted invasion of personal privacy, (D)
19 disclose the identity of a confidential
20 source and, in the case of a record com-
21 plied by a criminal law enforcement
22 authority in the course of a criminal in-
23 vestigation, or by an agency conducting a
24 lawful national security intelligence in-
25 vestigation, confidential information fur-
26 nished only by the confidential source,
27 (E) disclose investigative techniques and
28 procedures, or (F) endanger the life or
29 physical safety of law enforcement per-
30 sonnel; * * * ."
31 -----

32 9 The version of the Privacy Act that originally
passed the Senate contained a single exemption concerning
access to investigative records. That exemption, by de-
sign, was identical to the FOIA's (b)(7) exemption as
amended, except that it also provided that investigative
information could not be exempted where the information had
been maintained for a period longer than necessary to begin
criminal prosecution. 120 Cong. Rec. 36917, 36920,

-C-

1 36891 (1974) (§ 203(b) of the Senate version). The House
2 version, passed the same day (November 21, 1974), contained
3 the (j)(2)(B) and (k)(2) exemptions that appear in the Pri-
4 vacy Act, except the House version did not require an
5 agency to set forth in the implementing regulations the
6 reasons why a system of records was to be exempted. Id. at
7 36654, 36962, 36976. The House bill was also significantly
8 different from the Senate bill in other ways. Pressed for
9 time, the members and staffs of the relevant House and
10 Senate committees informally negotiated a compromise
11 between the two versions. The compromise retained the
12 basic thrust of the House measure but also included impor-
13 tant segments of the Senate bill. Id. at 40400, 40880.
14 The House then passed the Senate bill, amending it by sub-
15 stituting the language of the House measure. Id. at
16 39204. The Senate bill, as amended by the House, was pre-
17 sented to the Senate together with amendments incorporating
18 the compromises. Id. at 40397-405. The compromise measure
19 adopted the investigatory records exemptions contained in
20 the House bill, i.e., it adopted the (j)(2)(B) and (k)(2)
21 exemptions. The Senate version, which tracked the FOIA's
22 (b)(7) exemption, was dropped. Added to the House version,
23 however, was the requirement that regulations implementing
24 the exemptions set forth the reasons why the exemptions
25 were to be invoked. Id. at 40402-03. The Senate accepted
26 the compromise, id. at 40413; the House accepted the com-
27 promise with technical amendments, id. at 40880, 40886; the
28 Senate concurred in the amendments, id. at 40730; and the
29 Privacy Act was presented to the President and was signed.
30
31
32

FILED

PREGERSON, Circuit Judge(concurring):

FEB 4 1980

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

As I read the district court's Memorandum and Order Granting Motion for Summary Judgment, Judge Schwartz correctly treated the investigatory records exemptions found in the Freedom of Information Act(FOIA) and the Privacy Act as coextensive. In my view, a coextensive reading of these exemptions is required to effectuate the purposes of both acts. Both the FOIA and the Privacy Act contain provisions under which a party may gain access to records maintained by agencies of the United States. Under the FOIA, an individual may gain access to nonexempt records, whether or not the records pertain to him or her. Under the Privacy Act, an individual may gain access to nonexempt records only if they concern him or her. Thus, an individual may obtain documents pertaining to him or her under both acts. It makes good sense, then, that parties should have the same access to records pertaining to them under the Privacy Act as they would have under the FOIA. In this way, the disclosure purpose underlying both acts may be effectuated.

Under the FOIA, 5 U.S.C. §552, agencies must release records to a requesting party unless those records fall within one of nine exemptions to disclosure

set forth in §552(b). The exemption at issue here is the investigatory records exemption contained in subsection (b)(7). That provision exempts investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would:

(A)interfere with enforcement proceedings, (B)deprive a person of a right to a fair trial or an impartial adjudication, (C)constitute an unwarranted invasion of personal privacy, (D)disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E)disclose investigative techniques and procedures, or (F)endanger the life or physical safety of law enforcement personnel

§552(b)(7).

Under the FOIA, when an agency refuses to disclose requested documents by asserting the investigatory records exemption, the requesting party may challenge the claimed exemption in district court. The court may then examine the documents in camera to determine if the (b)(7) exemption does indeed apply. §552(a)(4)(B). The agency bears the burden of demonstrating both that the documents are investigatory records compiled for law enforcement purposes and that at least one of the justifications for nondisclosure spelled out in (b)(7) applies.

The scope of the investigatory records exemptions in the FOIA, 5 U.S.C. §552, and the Privacy Act,

5 U.S.C. §552a, is basically the same. Subsection (j)(2)(B) of the Privacy Act generally exempts from disclosure any system of records maintained

By an agency . . . which performs as its principal function any activity pertaining to the enforcement of criminal laws . . . and which consists of . . . information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual

§552a(j)(2)(B). To activate this exemption, however, an agency must promulgate rules in accordance with sections 553(b)(1), (2), and (3), (c), and (e) of the Administrative Procedure Act. Those rules must include a statement of reasons explaining why a system of records is exempt from the Privacy Act's disclosure provisions. §552a(j).

Pursuant to §552a(j), the FBI activated the Privacy Act's (j)(2)(B) investigatory records exemption by promulgating regulations in 28 C.F.R. §16.96. These regulations set forth the following statement of reasons justifying the exemption:

[T]hese [disclosure] provisions concern individual access to records and such access might compromise ongoing investigations, reveal investigatory techniques and confidential informants, and invade the privacy of private citizens who provide information in connection with a particular investigation. In addition, exemption . . . is necessary to protect the security of information classified in the interest of national defense and foreign policy.

28 C.F.R. §16.96(b)(2).

When an agency refuses to disclose the requested documents by asserting the Privacy Act's investigatory records exemption, the requesting party may challenge the claimed exemption in district court. The court is empowered to determine the matter de novo.

§552a(g)(3)(A). Unlike the FOIA, the Privacy Act does not expressly authorize in camera inspection of documents when an agency asserts the investigatory records exemption of subsection (j)(2)(B).

When one compares the (b)(7) exemption of the FOIA with the (j)(2)(B) exemption of the Privacy Act in conjunction with its activating regulations, the two schemes appear remarkably alike. Both schemes contemplate non-disclosure of documents for virtually identical reasons. For example, FOIA subsection (b)(7)(A) which authorizes nondisclosure if granting access to a document would "interfere with enforcement proceedings," is very similar to 28 C.F.R. §16.96 (b)(2), promulgated under the Privacy Act, which justifies denial of access to a document where disclosure would "compromise ongoing investigations." Furthermore, the considerations concerning the protection of national security, investigative techniques, personal privacy, and identity of confidential sources in subsections (b)(7)(C), (D), and (E) of the FOIA are mirrored in the Privacy Act's regulations at §16.96(b)(2). Since the considerations regarding investigatory records are the same in both statutory schemes, when a request for access to documents is made under both

acts, the most reasonable way to correlate the statutes would be to read the exemptions coextensively.

Additional support for a coextensive reading of the two exemptions is found in the Office of Management and Budget Guidelines to the Privacy Act, 40 FED. REG. 28,949 (July 9, 1975) and Supplementary Guidelines, 40 FED. REG. 56741 (December 4, 1975). The Privacy Act charges the OMB with the task of devising guidelines for the implementation of the Act. §552a note. These guidelines state:

When a request specifies, and may be processed under both the FOIA and the Privacy Act, or specifies neither Act, Privacy Act procedures should be employed. The individual should be advised, however, that the agency has elected to use Privacy Act procedures, of the existence and the general effect of the Freedom of Information Act, and of the difference, if any, between the agency's procedures under the two Acts (e.g., fees, time limits, access and appeals).

The net effect of this approach should be to assure that individuals do not, as a consequence of the Privacy Act, have less access to information pertaining to themselves than they had prior to its enactment.

Supplementary Guidelines, 40 FED. REG. at 56743.

The thrust of the OMB Guidelines is clear: they give the requesting individual the benefits of both acts.

Thus, in keeping with the spirit of the OMB Guidelines, a coextensive reading of the two investigatory records exemptions would assure that individuals do not, as a consequence of the Privacy Act, have less access to information pertaining to themselves than they had under the earlier enacted FOIA.

In reading the exemptions coextensively,

the question arises whether the court should allow an agency to claim the Privacy Act's investigatory records exemption only if release of material in the particular record would have one of the adverse effects set forth in the statement of reasons at 28 C.F.R. §16.96.¹ The Fourth Circuit recently upheld a denial of access under the Privacy Act where the reason for withholding the document was consistent with at least one of the adverse effects listed in the statement of reasons. Ryan v. Department of Justice, 595 F.2d. 954, 957(4th Cir. 1979). The Privacy Act does not expressly authorize in camera inspection by the district court of records purportedly exempt under subsection (j). This silence should not be construed to mean that Congress intended to preclude inquiry into whether release of material in the records would result in one of the adverse effects set forth in the statement of reasons. For a court to uphold an asserted investigatory record exemption without inquiring into whether the information in the document justifies the exemption would make judicial review meaningless.

Moreover, although Congress did not expressly authorize in camera review of investigatory records falling within the Privacy Act's (j) exemption, Congress did, nonetheless, authorize the district court both to enjoin an agency from improperly withholding records and to order the production of such records after a de novo determination. §552a(g)(3)(A).² Implicit in that authorization of de novo review is the power to examine the questioned document because

"'de novo' means trying the matter anew, the same as if it had not been heard before and as if no decision had been previously rendered." Farmingdale Supermarket, Inc. v. United States, 336 F.Supp. 534, 536 (D.C.N.J. 1971). Without the power of inspection, de novo review would be an ineffective remedy. In other words, in camera inspection is mandated because (1) de novo review is meaningless without it and (2) it is the only way a court can determine that the claimed exemption complies with the statement of reasons requirement set forth in §552a(j).

For the foregoing reasons, I conclude that the investigatory records exemptions under the two acts should be read coextensively. Judge Schwartz did just that. I vote to affirm.

FOOTNOTES

1. This question does not arise under the FOIA because subsection (b)(7) expressly requires that a reason supporting the exemption exist. See also Epstein v. Resor, 421 F.^{2d} 930, 933(9th Cir.), cert. denied 398 U.S. 965(1970).

2. §552a(g)(3)(A) provides, in pertinent part:

In any suit brought under the [access] provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court may determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(Emphasis added.) The Privacy Act debates are silent as to why subsection (j) was omitted from this provision. See 120 CONG. REC. 36655(1974)(remarks of Rep. Moorhead), reprinted in LEGISLATIVE HISTORY OF THE PRIVACY ACT OF 1974(SOURCEBOOK ON PRIVACY), at 908(1976).

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April

Mr. Boynton:

Re: New York Daily News Article
 by Columnist Liz Smith Regarding
 Judith Campbell Exner

Attached is a newspaper clipping regarding Judith Campbell Exner relating to her FOIA litigation with the FBI. By routing slip, the Director asked for the facts concerning the article.

Judith Exner submitted an FOIA request to the FBI in December, 1975. Records responsive to her request were located for the most part in organized crime files wherein her name had been indexed.

In 1975, during the course of testifying before a Senate committee, Mrs. Exner became aware that the FBI had conducted investigations and had maintained files relating to her since 1960. She believed that information published about her by the Senate committee in its official report was inaccurate. It also appeared to her that some inaccurate information from FBI files had been leaked to the press by Senate staff. She felt this leaked information regarding her alleged relationships with organized crime figures exposed her to personal danger.

She successfully sued the Bureau for expedited processing of her request by convincing the Court she had immediate need to see files and correct any inaccurate information therein. She was unsuccessful, however, in obtaining information for which the FBI had claimed various exemptions.

Nevertheless, in a subsequent action for attorney fees in the case, Mrs. Exner was found to have "substantially prevailed" by virtue of her success in securing priority processing, and fees were awarded. This was unusual in that most

2-ENCLOSURE Attachment

- 1 - Mr. Boynton
- 1 - [Redacted]
- 1 - [Redacted]
- 1 - [Redacted]
- 1 - [Redacted]
- 1 - (Attn: [Redacted])
- 1 - [Redacted]

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attorney fee cases under the FOIA involve an award for success in obtaining information the agency was attempting to withhold.

This appeal was brought by both parties. Mrs. Exner appealed on the basis of the Privacy Act (PA), a claim which she said was ignored in the lower courts, in an effort to obtain the remaining documents withheld by the Bureau. The Government appealed because of its contention that the award of attorney fees and costs was improper.

Exner's PA claim was premised on the theory that the information about her in FBI files was inaccurate, and the PA would give her the opportunity to have the files corrected. Obviously, she argued, she could correct the inaccuracies only if she had access to the files.

On February 11, 1980, the Ninth Circuit rejected her argument and upheld the District Court's ruling, saying that the District had given the PA claim the consideration it deserved. While granting that it was impossible for Exner to correct files she could not see, the Court noted that PA exemption (j)(2) was applicable in this situation. The Exner files were compiled in the course of criminal investigations and were contained in a system of records exempt from disclosure pursuant to appropriate regulations promulgated by the Justice Department. Therefore, Exner was entitled to no more information than she had already received.

The Court then rejected the Government's argument that the award of fees was improper. The Ninth Circuit found the award of fees to be a proper exercise of the District Court's discretion. Consideration is being given by the Department to seek certiorari regarding the adverse ruling.

The statement in the article that the Bureau was cited for contempt is inaccurate.

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ENCLOSURE

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DAILY PRESS SUMMARY FOR THE DIRECTOR

PREPARED BY

PUBLIC AFFAIRS OFFICE

April 2, 1980

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HOUSE COMMITTEE ACTION			
Appropriations	Defense subcmte hearing on implementation of military personnel programs. Afternoon meeting at 1:30.	9:30	H140 Capitol
	Military Construction subcmte hears public witnesses. Afternoon meeting at 1:30.	9:30	B300 Rayburn
	District of Columbia subcmte hearing on D.C. economic development and regulation programs.	10:00	H302 Capitol
	Energy subcmte hears public witnesses on energy programs.	10:00	2362 Rayburn
	HUD subcmte hearing on the National Institute for Building Sciences.	10:00	H143 Capitol
	Interior subcmte hearing on the Office of Territories. Afternoon meeting at 1:30.	10:00	B308 Rayburn
	Labor subcmte hearing on impact aid.	10:00	2358 Rayburn
	State Justice subcmte closed hearing on the FBI.	10:00	H310 Capitol
	Transportation subcmte hears the Secretary of Transportation.	10:00	2358 Rayburn
Armed Services	State-Justice subcmte hearing on the Chrysler loan program and other programs.	2:00	H310 Capitol
	Labor subcmte hears public testimony on program funding.	2:00	2358 Rayburn
Commerce	Investigations subcmte hearing on funding for naval oil reserve R&D.	10:30	2337 Rayburn
	Transportation subcmte continues hearings on the deregulation of railroads.	9:30	2322 Rayburn
Education & Labor	Oversight subcmte holds a hearing on hazardous wastes issues in North Memphis, Tenn.	10:00	2237 Rayburn
	Energy subcmte holds a hearing on legislation to reduce the use of oil and gas in the electric utility sector.	TBA	2322 Rayburn
	Post-secondary subcmte continues hearings on funding for the National Endowments for the Arts and Humanities.	9:30	304 Cannon
	Human Resources subcmte drafts funding for juvenile justice.	10:00	2257 Rayburn
Foreign Affairs	Europe subcmte will continue hearings on Carter's Persian Gulf policy.	10:00	2200 Rayburn
Intelligence	Program subcmte continues consideration of the FY81 intelligence community budget (closed).	2:30	H405 Capitol
Judiciary	Drafting session on press protection legislation addressing the Stanford Daily decision and funding for the Legal Services Corporation.	9:30	2141 Rayburn
Merchant Marine	Drafting session on omnibus maritime bill and other legislation.	9:30	1334 Longworth
Public Works	Drafting session on prospectuses for federal buildings and other pending bills.	10:00	2167 Rayburn
	Water resources subcmte holds drafting session on oil spill liability legislation.	2:00	2167 Rayburn
Science	Space subcmte drafts FY81 budget for NASA.	9:00	220 Rayburn
	Science Research subcmte hearings on new information technology.	9:00	2318 Rayburn
Small Business	Transportation subcmte hearing on mass transit R&D.	10:00	2200 Rayburn
	Equity capital subcmte holds hearings on the effect of monetary policy on small business.	1:00	2359A Rayburn
Veterans	Medical facilities subcmte drafts funding for FY81 construction.	9:00	340 Cannon
Ways & Means	Hearing on tax rates and marital status.	10:00	1100 Longworth

The Washington Post _____

Washington Star-News A2

Daily News (New York) _____

The New York Times _____

The Wall Street Journal _____

The Atlanta Constitution _____

The Los Angeles Times _____

Date 4-2-80

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Refusal to Indict Aides in Vesco Inquiry Confirmed

By EDWARD T. POUND

Special to The New York Times

WASHINGTON, April 1 — A Government lawyer confirmed today that a Federal grand jury had decided not to return any indictments in its investigation of allegations that Robert L. Vesco attempted to fix his legal problems at the White House.

But Ralph E. Ulmer, the foreman of the grand jury, immediately criticized what he said was the incompleteness of the Government announcement. Mr. Ulmer said, "The statement is incomplete and thus misleading, which is about par for the course for the Justice Department."

Mr. Ulmer said he was not questioning the accuracy of the announcement that the grand jury had decided not to return any indictments. He said he could not elaborate because he was bound by the secrecy provisions of grand jury proceedings.

Calls Statement Accurate

The announcement was made by Carl S. Rauh, the principal Assistant United States Attorney for the District of Columbia. It was that office that most recently presented evidence to the grand jury in

the case involving alleged influence peddling by Mr. Vesco, the fugitive financier.

Mr. Rauh said in the statement that the grand jury "has determined not to return any indictments from its investigation into allegations that Robert Vesco, through intermediaries, attempted to bribe members of the Carter Administration."

He said that the office of the United States Attorney here "concurs in this result" and had closed its investigation.

Georgian Made Charge

One White House official, Richard M. Harden, was under investigation by the grand jury for possible perjury. Mr. Harden's lawyer, Robert A. Altman of Washington, said today: "We're gratified that the investigation has confirmed that Mr. Harden is completely innocent of any wrongdoing. We feel that it is exceedingly unfortunate that earlier stages of the investigation were marred by leaks and the circulation of baseless allegations."

The inquiry began after a South Georgia businessman, R. L. Herring, asserted that Mr. Vesco wanted to bribe Administration officials to resolve his longstanding

legal problems. Mr. Vesco fled from the United States nearly a decade ago after he was charged with bilking stockholders out of millions of dollars in an international swindle.

Mr. Herring, who was convicted of fraud and racketeering charges unrelated to the Vesco inquiry in 1978 and is now in a Federal prison, said he had retained an Albany, Ga., lawyer, W. Spender Lee 4th, to approach the White House in Mr. Vesco's behalf. Mr. Lee later met with Mr. Harden, a close friend. Both men said Mr. Harden talked Mr. Lee out of continuing to represent Mr. Vesco.

When told of the grand jury's decision, Mr. Vesco said by telephone from the Bahamas, "That's interesting. I have no reaction."

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 The Atlanta Constitution ____
 The Los Angeles Times ____

Date 4/2/80

18-Month Vesco Probe Ends With No Indictments

By Laura A. Kiernan
and Charles R. Babcock
Washington Post Staff Writers

A federal grand jury here has decided against bringing any indictments in connection with allegations that fugitive financier Robert Vesco attempted to bribe members of the Carter administration to take care of his legal problems.

Principal Assistant U.S. Attorney Carl S. Rauh said in a statement yesterday that the federal prosecutor's office agrees with the grand jury's decision, and that the lengthy investigation is closed.

The prosecutor's unusual announcement of the grand jury's decision against indictments apparently was intended to put an official end to a case that had provoked intense publicity from the beginning.

The 18-month investigation opened in September 1978, after newspaper columnist Jack Anderson wrote that White House advisers Hamilton Jordan and Charles Kirbo were "linked" to a \$10 million political fix to help Vesco.

There followed an extensive series of exchanges between Anderson and the White House in which each side tried to undermine the other's credibility. The Justice Department investigation itself was marred by a variety of problems, including several changes in the prosecutors assigned to the case and public charges by the grand jury foreman of an administration cover-up.

By last summer, information leaked from the grand jury that prosecutors had doubts about the testimony of White House aide Richard M. Harden, who admitted he had been approached in February 1977 about the Vesco case by a childhood friend of his and Jordan's.

The friend, W. Spencer Lee IV, an Albany, Ga., lawyer, acknowledged that he had been paid \$10,000 by Georgia businessman and convicted swindler R. L. Herring to approach the White House about Vesco's legal problems. Vesco, who reportedly is living in the Bahamas, fled the country after he was indicted in New York on charges that he looted a publicly held corporation of millions of dollars and then tried to solve his legal problems with a \$200,000 contribution to the 1972 Nixon campaign.

President Carter met with Harden Feb. 15, 1977, shortly after Harden's meeting with Lee. At that time, Harden said, he told Carter that Lee had been offered "a large sum of

money" to arrange a meeting between Jordan and Vesco associates. Harden said he told Carter that he had persuaded Lee to drop the plan.

At that same meeting, however, Carter wrote a cryptic note to then Attorney General Griffin B. Bell which said, "Please see Spencer Lee from Albany when he requests an appointment." The note, which later was discovered in Justice Department files, never reached Bell.

Sources have said that the grand jury saw video-taped testimony from Carter about the meeting, but that Carter could recall few of the details of the discussion.

Suspicious about Harden's testimony were raised by prosecutors last fall after Lee—who told essentially the same story as Harden—failed two lie detector tests.

Harden's attorney, Robert Altman, said yesterday that he and Harden "are gratified that the investigation has confirmed that Mr. Harden is completely innocent of any wrongdoing."

Grand jury foreman Ralph E. Ulmer said yesterday that the grand jury voted against indictments in the case last week.

In August 1979, Ulmer tried to resign from the grand jury, charging that federal prosecutors had mishandled the investigation. Ulmer's accusations were vigorously denied by Assistant Attorney General Philip B. Heymann, chief of the Justice Department's Criminal Division. President Carter also strongly denied any charges that the Justice Department was trying to cover up any White House wrongdoing.

Eventually, Chief Judge William B. Bryant refused to allow Ulmer to resign from the grand jury.

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Date 4/2/80

Prostitute Says Burkhardt Aided Brothel Start

By Jane Mayer
Washington Star Staff Writer

An admitted prostitute yesterday testified that prominent Alexandria attorney James I. Burkhardt and former Commonwealth's Attorney William L. Cowhig helped her set up a house of prostitution in 1976.

Elizabeth Hartley Pesaresi told a U.S. District Court jury in Alexandria that Burkhardt gave her name and phone number to a man who lent her the money to establish the prostitution business.

The deal, she said, followed three lunches in late 1975 and early 1976 with Burkhardt and Cowhig at which she was promised protection against police interference.

Burkhardt, 49, is on trial on one count of conspiring to promote prostitution and two counts of causing women to cross state lines for the purpose of prostitution. He has pleaded innocent to the charges.

According to a three-count indictment, Burkhardt funneled regular cash payoffs from massage parlor clients to unnamed law-enforcement officials for protection.

Among Burkhardt's clients was Louis Michael Parrish, former operator of a \$1-million-a-year massage parlor business. Parrish was convicted in March 1979 of prostitution and racketeering charges.

Pesaresi said she had come to know Burkhardt through her work as a prostitute for Parrish.

Speaking in a soft voice, and at one point breaking into tears, Pesaresi testified that at one of the three lunches with Burkhardt and Cowhig, Cowhig promised her the operation would be safe.

"Mr. Cowhig told me that in Alexandria I didn't have to worry about prostitution," Pesaresi recalled. "He said he was the one to worry about that."

Pesaresi did not say whether Burkhardt overheard Cowhig's assurances.

Cowhig, originally the target of the grand jury investigation which led to Burkhardt's indictment, has not been charged in connection with alleged massage parlor bribes.

He was twice charged and acquitted of unrelated gambling and bribery charges. He resigned from office in February 1978 rather than face a third trial on a gambling charge.

Pesaresi said Burkhardt put her in touch with an acquaintance named David Hanneman, who loaned her \$1,500 to set up a small prostitution business in Alexandria's Oakwood apartment complex. The business lasted only three months, she added.

At that apartment, in the spring of 1976, Pesaresi said she and Burkhardt "got drunk and slept together once." She said that was the last time she had seen Burkhardt.

On cross-examination, Burkhardt's defense attorney, Kenneth M. Robinson, asked her, "Shortly after Mr. Burkhardt was indicted, did you call his office to wish him luck?"

"I did," she said and started to cry.

The government maintains that Pesaresi became an informer voluntarily last month. She was given immunity from prosecution yesterday.

Two other witnesses yesterday, including the former majority leader of the Virginia House of Delegates, testified they had knowledge of a massage parlor protection racket in Alexandria.

Former House Majority Leader James M. Thomson said he had learned from Burkhardt at a meeting in his own office on Dec. 22, 1978, that "there were \$200-a-week payments being made per massage parlor to law-enforcement officials."

Thomson, who later reported the allegations to the FBI, said "Burkhardt volunteered the information."

The statement came out, according to Thomson, during a meeting between Burkhardt, Thomson and Cowhig's attorney, Leonard B. Sussholz. The meeting, Thomson said, had been called to arrange a deal in which Cowhig would resign from office rather than face a third trial.

Thomson said Burkhardt did not identify who was making the payments or name the recipients.

"The name of Cowhig never came up," he said, "but I made some assumptions."

He said Burkhardt phoned him when Thomson testified before the grand jury to ask if he had identified anyone. "When I told him I hadn't," Thomson said, "he sounded relieved."

Larry Wadino, Michael Parrish's chief assistant, testified that Burkhardt was present at the inception of the protection scheme.

Wadino, who has been cooperating with the U.S. attorney's office since his conviction on racketeering charges a year ago, said yesterday that Burkhardt was present when Parrish gave Cowhig \$5,000 in cash at a Crystal City meeting in January 1974.

"When he (Parrish) came out of the meeting" Wadino testified, "he said, 'It's time to rock and roll.' . . . He meant that the city of Alexandria was locked up. Business following that meeting skyrocketed."

Protection, according to earlier testimony, included advance notice of police raids and descriptions of undercover police officers.

Wadino also testified that "Burkhardt told me to lie" under oath in a 1975 rape trial involving a Parrish prostitute.

He said he thought the prostitute had probably not been raped, but Burkhardt had told him, "This is a big case for the commonwealth, and they don't want to lose it."

Wadino said this meant on the witness stand he was to lie by saying the woman was of good character when he thought she was not. Wadino said he did lie in his testimony and, after the trial was over, "Burkhardt told me I did just fine."

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The Los Angeles Times _____

Date 4/2/80

Sex Ring Figure: Perjury Was a Favor to Cowhig

By Joe Picchirallo
Washington Post Staff Writer

A former lieutenant in a major Washington-area prostitution ring testified yesterday he lied under oath to help convict the defendant in a 1975 rape trial as a favor to then-Alexandria prosecutor William L. Cowhig.

Larry J. Wadino, 32, convicted last year of helping run the prostitution ring, said he committed perjury in the rape case at the urging of Alexandria attorney James I. Burkhardt, who told him, "The Commonwealth (Cowhig) does not want to lose this case."

The defendant, Danny Stubblefield, was subsequently convicted of the rape charge and served a four-year pri-

son term before being paroled last year.

The rape complaint was brought by a masseuse employed by the prostitution ring operated by Louis Michael Parrish with Wadino's assistance.

A source said yesterday that Wadino, called by the defense in the 1975 case to testify to the character of the masseuse, surprised lawyers on both sides by describing her under oath as truthful and worthy of being believed.

Wadino's testimony was interrupted and he was abruptly dropped as a defense witness, the source said.

Yesterday's testimony by Wadino came on the second day of Burkhardt's trial on racketeering and conspiracy charges growing out of his

role as attorney for a string of Parrish-owned massage parlors and out-call dating services—a once-flourishing Alexandria-based operation that grossed a million dollars a year, according to prosecutors.

Burkhardt, 49, the tall, curly-haired former president of the Alexandria Bar Association, has pleaded innocent. His attorneys have charged that Parrish and Wadino "concocted" the allegations against their former lawyer after the two were convicted last year on charges related to the prostitution ring.

The 4th U.S. Circuit Court of Appeals in Richmond yesterday upheld the convictions of Parrish, Wadino

and a third convicted member of the ring, Kathy Lynn Caldwell.

The defense argued yesterday that the three can now seek reduced sentences in return for their cooperation in the prosecution of Burkhardt.

Parrish testified on Monday he transmitted \$500 in monthly cash pay-offs to Cowhig through Burkhardt for more than three years to avoid prosecution of his sex-ring operation.

Wadino testified yesterday that he drove Parrish to a 1974 meeting with Cowhig and Burkhardt in which Cowhig allegedly promised not to enforce local massage parlor ordinances and state prostitution laws.

Wadino said that when Parrish emerged from the lunch at a Crystal City restaurant, Parrish announced: "It's time to rock and roll. The town is ours..." He said "we had the city of Alexandria locked up," Wadino testified.

When Wadino and a woman masseuse were arrested a short time later on charges related to operating a house of prostitution at a Parrish massage parlor named Bunny's, Wadino said, Burkhardt assured him the charge against him would be dropped in court. "Jim (Burkhardt) just said don't worry about it," Wadino recalled under oath.

Wadino said then-prosecutor Cowhig's office dismissed the charge against him before it came to trial and the woman masseuse received "a token \$100 fine."

When he left the courthouse after his case was dismissed, Wadino said, he saw Burkhardt arguing with the police officer who raided the massage parlor. According to Wadino, Burkhardt later told him "that SOB will be back in uniform on the streets" as punishment for arresting Wadino and the masseuse. A short time later, Wadino said, he saw the same officer patrolling the streets in uniform.

Before the 1975 rape trial, Wadino said, he had told defendant Stubblefield's lawyer that he knew the mas-

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seuse pressing the charges had a bad character. But later, Wadino said, Burkhardt told him it was a "big case" for Cowhig's office, and Burkhardt allegedly instructed him to "paint a picture of her as being a pillar of the community."

When he got to the courthouse, Wadino said, he saw Burkhardt talking to Cowhig. Burkhardt then repeated to him, Wadino said, that "the Commonwealth does not want to lose this case, you know what I mean?" Wadino said Burkhardt did not specif-

ically tell him to lie, but said Burkhardt's meaning was clear. "I knew what Jim Burkhardt meant. He meant for me to lie," Wadino swore.

Wadino also expanded yesterday on earlier testimony by Parrish concerning alleged payoffs to Alexandria city officials.

He testified that he personally made payoffs to former Alexandria health inspector Richard L. Mathews, whose duties included inspecting massage parlors for health code violations.

Mathews, 36, who now works as a health inspector for the Fauquier County health department, has strongly denied receiving any payoffs.

Wadino, a short, stocky man, also testified that Parrish took \$5,000 to the 1974 meeting with Burkhardt and Cowhig at the Crystal City restaurant and intended to give it to Cowhig as a bribe.

Wadino was not present when the three met. Parrish has testified there was no talk of payoffs on that occasion.

Cowhig resigned as chief prosecutor a year ago after being acquitted at two trials of state charges related to illegal bingo operations in Alexandria.

The defense has argued that Cowhig is a target of a two-year federal investigation of possible official corruption in Alexandria and that Burkhardt was indicted to force him to give testimony against Cowhig. Burk-

hardt's lawyers said their client never transmitted any payoffs to Cowhig.

Another former Parrish employee, Elizabeth Dane Pesaresi, testified yesterday that when she made plans to run her own prostitution business out of an Alexandria apartment, Cowhig assured her that she was not in danger of being prosecuted.

"Mr. Cowhig told me that in Alexandria I did not have to worry about being prosecuted," she recalled under oath. She said she met Cowhig twice through Burkhardt and described Cowhig as having "a colorful sense of humor." Pesaresi testified after receiving immunity from the government.

Burkhardt announced yesterday that he will testify in his defense. The prosecution completed its case yesterday.

Staff writer Stephanie Mansfield contributed to this story.

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LIZ SMITH



Judith earned justice the hard way

WE MUST ALL HANG together or assuredly we shall all hang separately," said Ben Franklin. (And Odyssey, those native New Yorkers, have titled their new record album "Hang Together" at the suggestion of their producer-writer Sandy Linzer.)

Don't say there ain't no justice. Judith and Dan Exner have had their share of troubles since she was exposed by the FBI as a former lover of John F. Kennedy's during his term in office, and also as a friend of Frank Sinatra's and of mob boss Sam Giancana's. After the FBI leaked Exner's private Senate testimony, she sat down and wrote a book telling her own story and defending herself. For this, she was pilloried in the press and by Kennedy defenders as if she had made it all up.

Since those traumatic days, Judith has had an operation for breast cancer and her loyal husband Dan was stricken by a brain tumor. Both of the Exners have struggled back from the brink. When Dan was told he couldn't survive his illness, it made him angry. "I don't like to be told I can't do something," he said.

Now Judith has won several unprecedented struggles, striking blows for herself and for others. First, she set a precedent in suing the FBI for her papers under the Freedom of Information Act and then winning all fees and costs. Both the AP and UPI wrongly reported that the FBI voluntarily surrendered Judith's papers. In truth, the FBI had to be ordered repeatedly by the courts to give up the Exner papers, and then Judith had to have the bureau cited for contempt before they gave in. But she proved that a citizen can take on the FBI and win.

Then, the tabloid *Midnight* settled with Judith out of court in a libel case, where they had called her "a spy hired by the mafia to report on the President of the United States." Exner didn't get a lot of money but did vindicate herself and received more than enough to cover legal fees. The Exners now live in Newport Beach, Calif.

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Behind The Schemes

Irv Davidson, D.C.'s
Master Operator

By Gordon Chaplin

Moving lightly on his feet, very lightly, almost as if he were on eggs, I. Irving Davidson flits around his desk to touch the upper arm of a visitor. The touch is light as the walk, inviting confidentiality, promising discretion. The look is sharp, but not too sharp: dark suit, rounded gold jewelry, crisp white shirt. The face . . . you've seen it in the various corridors of power, elfin even at 59, always slightly in the shadow but always smiling, as if Irv Davidson knows something that the rest of us can only guess at: the ultimate Inside Story.

"Listen, if I get knocked out of the box it's going to hurt this country." A wink. A squeeze. The hint of anonymous contact, vague yet crucial under-standings. "I'm involved in some very sensitive stuff overseas. I'm talking to people who our own people can't talk to."

For the second time in his long career as the Handy Andy of behind-the-scenes Washington, promoter-lobbyist Irv Davidson may be in trouble with the law. Trouble means publicity. Publicity is anathema to the back-channel function: "You can't operate with it. I'm looking for deals. I put people together. I work on a very personal level."

Indeed. Two people the FBI recently said that Davidson has "put together" are reputed New Orleans Mafia boss Carlos Marcello and Mario T. Noto, the former No. 2 man in the Immigration Service. Result: The FBI is investigating allegations that Noto acted improperly to help Marcello fight deportation. Davidson also introduced his "old friend" Marcello to another of his old friends who later turned out to be an undercover informer posing as an insurance salesman in the FBI sting scam Operation Brillab, which surfaced in February. Result: The FBI is investigating allegations that public officials ranging from Louisiana Lt. Gov. Jimmy Fitz-

morris to Texas House Speaker William Clayton accepted illegal money. Fitzmorris and Clayton have testified before grand juries in connection with Brillab.

So Irv Davidson is walking like a cat on eggs. FBI agents grilled him for four hours Feb. 8 and told him they had bugged his phone for a year before that. He is under investigation. Suppose he is subpoenaed himself? Suppose there is a leak? Suppose . . . "I deal in confidentialities. If it gets out that I talked a lot, if my friends start thinking I have a big mouth . . ."

Mr. Witty

Ah yes. The friends of Irv Davidson. Columnist Jack Anderson is as well acquainted with them as anybody.

"Your first impression of Irv is that he's a cheap operator," Anderson has said. "But when you get to know him you find he's got better contacts than Clark Clifford or any other St. Louis smoothie. In fact he's got unbelievable contacts. I'd call him unique. I've investigated a lot of five percenters and promoters but I've never run across anybody like him."

Davidson's array of business cards say everything from "public relations" to "door opener and arranger." Of course there's no official name for what he really does . . . which is wheeling and dealing without a net, pedaling his lonely little bicycle across the tightrope hundreds of feet above the center ring. Usually in darkness, too: No illumination for Irv. He's the grease in the machinery, the Grand Central switchboard operator. His stock in trade is being "witty," as they say in the CIA to describe someone who is aware of the various covert maneuverings. He claims that knowing the right Inside Story for everybody is now worth \$250,000 a year.

Now certainly people like Clark Clifford must know a good piece of the Inside Story themselves, but they are too big, solid and respectable to make it into all the corners. Clifford would look out of place in the red-browed, twilit Gaslight Club with its neo-bunny-waitresses that the be-

hind-the-scenes set love so much. Whereas Davidson is not only on a first-name basis with practically everyone there, but also with the hard core at Sans Souci, the Sheraton-Carlton Hotel Bar and the Georgetown Inn.

Jack Anderson, and before him Drew Pearson, not only calls Davidson but rented office space from him in the past. He was the first person Anderson called when Teamster boss Jimmy Hoffa disappeared and when Marcello was reported to be back in the country after deportation to Guatemala. When Anderson wanted to talk to Bobby Baker, Davidson actually brought Baker into Anderson's office. In the end Davidson's maneuvering to capitalize on his Anderson connection forced the columnist to issue careful instructions: "Nobody is to say anything that Irv can use for promoting himself."

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'Fidel Knows...'

Even now, with the heavy footsteps of the FBI echoing in the corridor, Davidson will talk about deals with an almost frighteningly irrepressible banty pleasure:

"Who needs to get mixed up in this horse - - - with Immigration?" He waves his hand around his office, which is full of totems from various deals—model tanks and planes, plaques of quotations, trick paperweights, carved wooden statues. It looks like the bar at the 21 Club in New York. "Look what I have going. I'm bringing the Coke soft drink team into Sudan to show them how to grow citrus in the desert. I sold Clint Murchison's oil pier to the Malaysians when nobody else could even talk to them. I just borrowed \$1 million for six months on nothing but pure bull."

The little tank is his favorite story: "An Israeli Staghound tank, see. I sold 70 of these to Nicaragua from Israel and then we decided to sell 20 of them to Batista in Cuba. We got them in shape, we put them on a Swedish boat to Havana and guess what? Castro got hold of them. Next thing I know he's riding into the city of Havana on one of our tanks. Now, there's an ending to this story going to knock you off your chair... I got a call from the Cuban ambassador in

Mexico City. He wanted me to get a sugar group together to go to Cuba and talk to Castro. I said Castro's not going to want me in there after that tank business. And the ambassador

said: 'Fidel knows all about you and the tanks. He likes you because you provided his transportation.'

Favors and Debts

The son of a Pittsburgh meat market owner, Davidson began to piece together his unique web of contacts as an "expediter" for the ammunition program in the War Production Board during World War II, he has said, and "I've been expediting ever since." He has represented the American interests of dictators in Nicaragua ("Somoza called me to get him a 707 out of the country during the Sandinista thing"), Indonesia ("I got Malik in to see LBJ during the Commie coup thing when no one else could"); Haiti, and Cuba. He says he's putting together fast food deals in France, import deals in Italy, agri-technology and construction in the Mideast, and expediting ventures for Texas oilman Clint Murchison in Singapore, Malaysia and Indonesia. This year he registered as a foreign agent for Sudan, and is trying to form a lobby-expertise group for the Association of Southeast Asian Nations.

Debts and favors is what it all goes back to... the personal level. Irv can get you anything: a hotel room in a crowded city, tickets to a sold-out ballgame, office space, a quick loan. He never forgets who owes him what. When Murchison needed \$4 million for a housing project and was too proud to ask his father, Davidson put him in touch with Hoffa on the condition Drew Pearson be allowed to write a column about it. He has been involved in Murchison deals ever since and now Murchison is willing to say about him: "I have found him to be reliable and straightforward and know his other clients have too."

Davidson ran afoul of the law in 1969. At that time he and a friend named Leonard Bursten got an \$11 million Teamster Pension fund loan to develop property near Beverly Hills. If his friend Hoffa had still been firmly in control, things might have been different. But with Hoffa out, Davidson and Bursten found themselves pleading guilty to charges of concealing \$500,000 in a bankruptcy proceeding when the Teamsters tried to foreclose.

What happened after Davidson's guilty plea is not precisely clear. The record indicates his lawyers moved to have the plea expunged and va-

cated. The motion, is an unusual turn of events, was granted. Last year Davidson filed a \$60 million suit against the Teamsters to recover real estate and damages.

'Re Irving Davidson'

Now part of the Inside Story here, Davidson confides, involves an item in the Justice Department known as the "in-depth file re Irving Davidson." He will make mysterious bits of paper available (who wrote them, where they came from he will not say) describing it as detailing "activities of Irv in the interests of the United States... The details are of a sensitive nature..."

"I told those FBI people not to play superagent with me," he says now. "I travel on two passports, but I've never taken a nickel from Uncle for my services. Look at my diary here: Jan. 4, National Security Council. Do you think I planted that? I tell you that I'm dealing day and night with those boys."

He is asked for official corroboration.

"Are you kidding. If those details came out, I'd be useless. Nobody'd trust me."

After some hemming and hawing, a short, smiling State Department man does show up in the office, on the strict condition his name not be used. "Sometimes the interests of the United States requires certain things which because of their shaky nature can not be identified with the United States," he says.

And, with the caution of a true, tried diplomat, that is about as far as he will go.

It is certainly not as far as Davidson himself went in defending his friend Jimmy Hoffa when Hoffa was in trouble. He peddled tapes purporting to tell "explicitly" how a certain Marie Monday had compromised the trial judge (the judge denied it and Monday recanted). He filed an affidavit with the Supreme Court on the tapping of Hoffa's phone. And he lobbied mightily with the Justice Department, where he was seen as "this little guy who used to keep trying to tell Bobby Kennedy what a great guy Jimmy Hoffa was. I mean you had to admire him, you know, in those days it wasn't the greatest thing in the world to be in favor of Hoffa. But he never wavered. Hoffa was a standup guy, he'd say. It's the people around him who are leading him astray."

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One Guilty Plea In 'Mafia' Trial

FREEHOLD, N.J. (AP) — One defendant in a trial aimed at proving the existence of "the Mafia" pleaded guilty to conspiracy and bookmaking charges before attorneys for four other alleged underworld figures gave opening statements. The defendant, 51-year-old Thomas DePhillips of Belleville, is to be sentenced to a total of five years in a plea bargain.

The defense lawyers contended in their opening statements that the prosecutors lacked concrete evidence to support the charges in the indictment, which ranged from lotteries to loansharking to murder. Many of the witnesses who could testify about specific incidents are dead, they said.

"The indictment reads like a fairy tale — all of this garbage about a spider-like network of organized crime from Alaska to Florida," said Joseph Ferrante, the attorney for one of the four remaining defendants.

"The valiant men of our state police sat at tape recorders like children and listened to grown men cursing and bragging and trying to impress each other," he said.

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3 Indicted in Gun-Running Case

A federal grand jury indicted three men for conspiring to export weapons illegally to Northern Ireland and the Republic of Ireland.

Attorney General Benjamin R. Civiletti said the indictment, returned in U.S. District Court in Raleigh, N.C., named as defendants Howard B. Bruton Jr. of Wilson, N.C., and Robert Ferraro and George DeMeo both of New York City.

Brandon Alvey, criminal division attorney who supervised the case, said in a telephone interview from Raleigh that this was the 13th or 14th gun-running case involving either Northern Ireland or the Republic of Ireland brought by the department since 1972. But he declined to say whether this one, like some of the previous ones, involved alleged shipments to the outlawed Irish Republican Army.

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Racketeering Charged to S.C. Aide

COLUMBIA, S.C.—A federal grand jury indicted state Sen. John D. Long III. on racketeering charges. The indictment charges Long and Billy D. Roark, a former security officer of the Senate, with taking bribes in return for state jobs.

U.S. Attorney Thomas E. Lydon would not comment on the investigation except to say it has been continuing for several months.

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1 UNITED STATES COURT OF APPEALS
2 FOR THE NINTH CIRCUIT
3

4
5 JUDITH KATHERINE EXNER,)

6 Plaintiff-Appellee,)

7 -vs-)

NO. 76-1903

8 FEDERAL BUREAU OF INVESTIGATION,)
9 et al.,)

10 Defendants-Appellants.)

11
12 PLAINTIFF-APPELLEE'S OPPOSITION TO
13 GOVERNMENT'S MOTION FOR A STAY PENDING APPEAL
14

15 NOT RECORDED

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21 LEGAL COUNSEL

22 ENCLOSURE

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26 Suite 1800

27 Los Angeles, CA 90067

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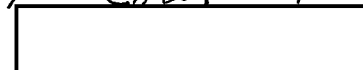
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PLAINTIFF-APPELLEE'S OPPOSITION TO
GOVERNMENT'S MOTION FOR A STAY PENDING APPEAL

1. STATEMENT OF ISSUE PRESENTED.

The issue presented by this appeal is whether the trial court abused its discretion by refusing to grant the Government's 1/ motion for a stay of plaintiff-appellee's 2/ action brought pursuant to the Freedom of Information Act 3/ and the Privacy Act of 1974. 4/

The Government's request for a stay was based upon a specific provision in the Freedom of Information Act [5 U.S.C. §552(a)(6)(C)] which allows the District Court, in its discretion, to grant the Government a stay if the Government can demonstrate that exceptional circumstances exist, and that the agency involved is exercising due diligence in responding to the Freedom of Information Act request and needs additional time to complete its review of the requested records. The District Court in this action ruled that neither exceptional circumstances existed nor that the Government had shown due diligence in undertaking a

1/ Defendants and appellants in this action consist of the Federal Bureau of Investigation [FBI]; Clarence M. Kelley, the Director of the FBI; the Department of Justice; and Edward H. Levi, Attorney General of the United States. For the sake of convenience, all of the defendants/appellants will be collectively referred to as the "Government."

2/ Plaintiff and Appellee is Judith Katherine Exner who, for the sake of convenience, will be referred to herein as "Exner."

3/ 5 U.S.C. §552.

4/ 5 U.S.C. §552a.

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ENCLOSURE

1 review of the requested records, 5/ and thus denied the Govern-
2 ment's request for a stay. The Government is appealing from th
3 District Court's Order denying the stay pending the Government
4 review of the records, which was entered on April 20, 1976. 6/

5 Although the Government is only appealing from the
6 April 20, 1976, Order which denied the Government a stay of
7 Mrs. Exner's action, the purpose of the requested stay relates
8 to an April 9, 1976, Order entered by the District Court. That
9 earlier order required the Government to answer Mrs. Exner's
10 complaint, and to identify the documents contained in the FBI
11 files relating to Mrs. Exner which the Government contends are
12 exempt from disclosure either under the Freedom of Information
13 Act or the Privacy Act. 7/

14
15 2. SUMMARY OF THE LITIGATION.

16 On February 19, 1976, Judith Katherine Exner filed h
17 Amended Complaint for Injunctive Relief Under the Privacy Act
18 of 1974 and the Freedom of Information Act. The complaint, wh
19

20 5/ In fact, one month after the District Court originally
21 ordered the Government to complete its review of the
22 requested records, the District Court specifically found
that the Government had neither determined the scope of th
requested records nor had it begun to review those records

23 6/ The District Court entered two Orders on April 20, 1976.
24 The first Order, and the one being appealed from herein,
25 denied the Government's request for a stay pursuant to
26 5 U.S.C. §552(a)(6)(C). The second Order was a denial of
the Government's request for a stay pending appeal, brough
pursuant to Rule 62(c) of the Federal Rules of Civil
Procedure.

27 7/ The April 9, 1976, Order is contained in the Clerk's
28 Transcript at pages 1 to 4.

1 alleged that plaintiff had exhausted her administrative remedies
2 sought an order enjoining the Government from withholding from
3 her records of the Federal Bureau of Investigation that relate
4 to her, and requiring the Government to make those records
5 available to Mrs. Exner. Additionally, pursuant to the Privacy
6 Act of 1974, Mrs. Exner sought an order requiring that the
7 records be declared private and that the Government be enjoined
8 from distributing information in her files to any other person.
9 Mrs. Exner also sought the right to correct any records in the
10 FBI file which are inaccurate.

11 Following hearings on certain pretrial motions, on
12 March 15, 1976, the Honorable Edward J. Schwartz, United States
13 District Judge, ordered that the Government file its answer to
14 the Amended Complaint by April 12, 1976. Judge Schwartz further
15 ordered that by April 12, 1976, the defendants must file with
16 the Court an affidavit or affidavits containing certain information
17 about the FBI records relating to Mrs. Exner. Basing his
18 ruling, in part, upon Vaughn v. Rosen, 484 F.2d 820, 826-828
19 (D.C. Cir., 1973), Judge Schwartz ordered that the defendants
20 indicate in their affidavits the following:

21 "2.1) A statement whether the FBI has maintained
22 and/or possesses any file or files relating to the
23 plaintiff or containing any information about the
24 plaintiff.

25 "2.2) If such file or files exist, a description
26 of the file or files maintained and/or possessed by
27 the FBI relating to the plaintiff. Said description
28 shall include the size of the file, which may be

1 delineated either by the number of documents, the
2 total pages of documents, or the dimensions of the
3 file or files.

4 "2.3) If such file or files exist, a description
5 or list of the documents contained in said file or
6 files which are not allegedly covered by any exemptions
7 to the Privacy Act of 1974 or the Freedom of Information
8 Act, and which therefore can be immediately turned over
9 to the plaintiff for her review. If the Government con-
10 tends that only a portion of the document is exempt from
11 disclosure, the remaining portions of the document should
12 be described so that it may be disclosed to the plaintiff

13 "2.4) If such file or files exist, the defendants,
14 by means of a detailed description, must set forth any
15 exemption or exemptions which they allege apply to any
16 document or any portion of a document in the FBI files.
17 The list of exemptions should be sufficiently detailed
18 so that the Court can identify the documents or portion
19 of documents to which the defendants are claiming a
20 statutory exemption applies. The description should
21 not be so detailed so as to contain information which
22 compromises the secret nature of the documents, and,
23 in this regard, excessive reference to the actual
24 language of the documents should be avoided. In large
25 documents, the defendants must specify, in detail, which
26 portions of the documents are disclosable and which are
27 allegedly exempt."

28 / / / /

/ / / /

1 3. ARGUMENT.

2 3.1) The District Court did not Abuse Its Discretion in
3 Denying the Government's Motion for a Stay Because
4 the Government Failed to Demonstrate that Either
5 Exceptional Circumstances Exist or that It has
6 Exercised Due Diligence in Reviewing the FBI Files
7 Relating to Mrs. Exner.

8 The Government's request for a stay of proceedings
9 pending its review of the FBI records relating to Mrs. Exner was
10 based upon a specific provision of the Freedom of Information
11 Act [5 U.S.C. §552(a)(6)(C)], which provides, in pertinent part
12 that:

13 " . . . If the government can show exceptional
14 circumstances exist in that the agency is exercising
15 due diligence in responding to the request,
16 the court may retain jurisdiction and allow the
17 agency additional time to complete its review of
18 the records. . . . "

19 This provision sets forth a two-part test with which the Government
20 must comply in order to obtain a stay of proceedings:

21 (1) The Government must show that "exceptional circumstances"
22 exist; and

23 (2) The Government must show that it has exercised
24 "due diligence" in responding to the request and
25 that it needs additional time to complete its
26 review of the records.

27 The Government failed to show either that exceptional circumstances
28 exist, or that it had exercised such due diligence

1 In addition to the above ruling, the District Court further
2 ordered that the documents to which the Government did not claim
3 an exemption either under the Freedom of Information Act or under
4 the Privacy Act should be immediately made available to Mrs. Exner
5 for her examination. Pending Mrs. Exner's and the Court's
6 opportunity to review any documents disclosed to Mrs. Exner by
7 the Government, the Government was further ordered not to dis-
8 close the contents of the documents to any other person or
9 entity, except for such disclosure which constitutes "routine
10 use" as defined in the Privacy Act. ^{8/}

11 The March 15, 1976, ruling by Judge Schwartz was
12 memorialized in written form and filed and entered by the Court
13 on April 9, 1976.

14 On April 12, 1976, the date on which the Government's
15 answer to the amended complaint was due, and the date on which
16 the affidavit or affidavits required to be filed by the Govern-
17 ment were due, the Government filed an ex parte motion seeking
18 a stay of Mrs. Exner's action pending the Government's review
19 of her FBI files. The Government's motion was based on a
20 specific provision of the Freedom of Information Act [5 U.S.C.
21 §552(a)(6)(C)], which allows the District Court, in its discre-
22 tion, the right to grant the Government a stay of litigation
23 brought pursuant to the Freedom of Information Act if the Gove-
24 nment can affirmatively demonstrate that "exceptional circum-
25 stances" exist and that the Government is exercising "due dili-
26 gence" in completing its review of the requested documents. T

27

28 ^{8/} 5 U.S.C. §§552a(a)(7) and 552a(b).

1 gist of the Government's motion for a stay was based on the cla
2 that the FBI was backlogged in its review of Freedom of Informa
3 tion Act and Privacy Act requests, and that it did not feel it
4 necessary to expedite its review of Mrs. Exner's files, even
5 though the District Court had already ordered that such a review
6 be completed by April 12, 1976.

7 At the hearing on April 12, 1976, the District Court
8 denied the Government's request for a stay, but did give the
9 Government an additional 15 days in which to comply with the
10 April 9, 1976, Order. ^{9/}

11 On April 20, 1976, the Government filed its Notice of
12 Appeal from the Court's April 20, 1976, Order denying the stay.
13 On that same date, April 20, 1976, the District Court denied the
14 Government's motion for a stay pending an appeal pursuant to
15 Rule 62(c) of the Federal Rules of Civil Procedure.

16 Because of the pendency of the District Court's April
17 1976, and April 20, 1976, Orders requiring the Government to
18 complete its review of Mrs. Exner's file and file the required
19 affidavits by April 27, 1976, this Court entered an order
20 temporarily staying the District Court's orders of April 9 and
21 April 20, 1976, pending this appeal. The Order of this Court
22 was filed on April 23, 1976.

24 ^{9/} The ruling made by the District Court denying the Govern-
25 ment's motion for a stay was memorialized by a written
26 Order filed and entered on April 20, 1976, and contained
in the Clerk's Transcript on pages 5 and 6.

27 / / / /

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28 / / / /

/ / / /

1 necessary to give the District Court a basis for granting a
2 discretionary stay.

3 The Government admitted in its papers filed in support
4 of its motion for a stay and in the comments of its counsel
5 during oral argument on the motion for a stay that it not only
6 had failed to begin a review of Mrs. Exner's records, but also
7 that it had refused to attempt to determine the scope of the
8 requested records, so that it was impossible to even estimate
9 how long it would take to complete its review of the records or
10 that review began. 10/

11
12 10/ The affidavit of Michael L. Hanigan, Special Agent of the
13 FBI assigned in a supervisory capacity to the Freedom of
14 Information-Privacy Act section of the FBI, filed in
15 support of the Government's motion for a stay, noted:

16 "Since the volume of documents involved [in
17 Mrs. Exner's request] has not been ascertained
18 yet because the request has not been processed
19 preferentially out of order, it is not possible
20 to project how long the review will take."
(Hanigan affidavit at page 11, paragraph 12.)

21 In oral argument at the April 12, 1976, hearing before
22 Judge Schwartz on the Government's motion for a stay,
23 the Judge had the following exchange with Mrs. Zusan
24 of the Department of Justice:

25 "THE COURT: Are you telling me that nobody
26 has looked at this file in connection with any
27 of these proceedings?

28 "MRS. ZUSMAN: That is what I was told.

"THE COURT: Who told you that?

"MRS. ZUSMAN: I asked directly the individual
attorney who is the FBI person at the FBI assigned
to this case.

"THE COURT: What is his name?

"MRS. ZUSMAN: Mr. Maschella.

"THE COURT: And no one in the FBI ever looked
at this file in the Justice Division?

"MRS. ZUSMAN: The Federal Bureau of Investigation,
as you know is a separate subagency. When I

(Footnote 10 continued next page)

1 Since 5 U.S.C. §552(a)(6)(C) requires the Government
2 to affirmatively demonstrate that it has exercised due diligence
3 in its efforts to complete the review of requested records, it
4 is incumbent upon the Government to demonstrate that it has taken
5 the necessary steps to start processing Mrs. Exner's records in
6 order to comply with the essential prerequisites of the provision
7 upon which it bases its request for a stay.

8 Based on the factual record before the District Court
9 since the Government admitted it had intentionally avoided
10 beginning any review of Mrs. Exner's records, no basis for the
11 Government's request for a stay existed. Moreover, the Government
12 could not argue, in good faith, that it had exercised "due
13 diligence", since it affirmatively appeared that the Government
14 had the time to begin its review of Mrs. Exner's records (if
15 not to complete that review), and chose to spend that time seeking
16 a stay instead. District Judge Schwartz observed this fact
17 at the April 12, 1976, hearing on the Government's motion for
18 stay:

19 "Now what the Government has done today is that
20 they have filed about 50 pages of materials, affidavits
21 and so on, which I assume has taken a great
22 deal of time for somebody to prepare. You have spent
23 or will have spent two days on this matter in

24
25 _____
(Footnote 10 continued)

26 asked if they had any idea what the scope was
27 in response to this request, I was told that
28 as a matter of principle, the file has not yet
been looked at. . . ." (Reporter's Transcript
of Proceedings, April 12, 1976, at page 23.)

1 transportation in appearing here. I have an idea
2 that you spent some time preparing for this hear-
3 ing and preparing these papers, and yet, the
4 Government has done nothing to comply with the
5 Court's Order [of April 9, 1976].

6 "I just find it rather incredible to hear
7 that the Government hasn't even looked at the
8 file and doesn't even know whether it's a small
9 file, a big file, or what's in it when obviously,
10 the FBI provided the file to the Senate Committee,
11 which has had the file and Mrs. Exner filed her
12 request over three months ago." 11/ (Reporter's
13 Transcript of Proceedings, April 12, 1976, at
14 page 20.)

15 Judge Schwartz further noted:

16 "If the Government had used part of the effort--
17 just a small part of the effort--in time that has been
18 required for you to come out here, for you to prepare
19 these papers--and it is a rather thick bunch of papers
20 that have been prepared--to take a look at the file
21 and to try to do what the Court requested, this thing
22 could already have been taken care of.

23 "Now, I think it is rather obvious to me that the
24

25 11/ Evidence before the District Court indicated that the
26 FBI had compiled its records relating to Mrs. Exner
27 and had turned them over to a Special Select Senate
28 Subcommittee prior to September of 1975. See the Affi-
davit of Judith Katherine Exner in Support of Plaintiff's
Motion for an Ex Parte Order, filed February 19, 1976,
at page 2, line 20, to page 7, line 21.

1
2 FBI just doesn't want to give this file out, and I
3 don't think that they're being forthright in coming
4 in and saying, well, we don't have enough money to
5 process this; we don't have enough personnel to
6 process it; we just haven't gotten around to it.

7 I just don't think that that is a reasonable response
8 to the Court's Order back on March 15." (Reporter's
9 Transcript of Proceedings, April 12, 1976, at p. 22.)

10 Not only has the Government failed to show that it has
11 exercised due diligence, but also it has failed to demonstrate
12 any exceptional circumstances which relate to the present case.
13 The Government's argument in support of its stay centers on
14 the claim that the FBI is without sufficient personnel to review
15 all of the Freedom of Information Act and Privacy Act requests,
16 which have been filed, and that such requests should be reviewed
17 only in order of their receipt by the FBI. The Government
18 suggests that it might begin processing Mrs. Exner's request in
19 approximately four months, but notes that it could possibly be
20 longer than four months. 12/

21 A fair reading of Section (a)(6)(C) of the Freedom
22 of Information Act indicates that the term "exceptional circum-
23 stances" relates to the circumstances surrounding an individual
24 request, and not to circumstances which relate to the Govern-
25 ment's overall handling of Freedom of Information Act requests.

26
27 12/ Affidavit of Michael Hanigan (see fn. 10, infra, at
28 page 8), at page 11, lines 8 to 32.

1 The opening sentence of Section (a) (6) (C) makes reference to
2 specific, individual requests, and the right of the requestor to
3 deem that his request has been denied and commence litigation
4 in the applicable District Court pursuant to Section 552(a) (4)
5 of the Act. The second sentence of Section (a) (6) (C) proceeds
6 to set forth the showing which the Government must make to
7 warrant the District Court's granting of a stay pending the
8 Government's completion of its review of the requested records.
9 Thus, it appears that the requirement of "exceptional circum-
10 stances" relates to circumstances which would effect the indi-
11 vidual request.

12 The Government has not demonstrated that any "excep-
13 tional circumstances" exist with relation to Mrs. Exner's request.
14 It has only indicated that it is without sufficient personnel
15 to handle the numerous requests that have been filed with the
16 FBI. The Government's moving papers make no attempt to indicate
17 how many Freedom of Information Act requests are the subject of
18 pending litigation, as is Mrs. Exner's. The total failure of
19 the Government to demonstrate the existence of any exceptional
20 circumstances relating to her request constituted sufficient
21 ground for the District Court to deny the Government's motion
22 for a stay. 13/

23
24 13/ The type of situation which may justify a claim that
25 "exceptional circumstances" exist might involve a case
26 where the agency determined that the number of documents
27 sought by a Freedom of Information Act request numbered
28 in the thousands, and that it would take a substantial
amount of time to review all of the documents. In such
a situation, upon a showing of due diligence (i.e. so many
documents were being reviewed on a daily basis), the Court

(Footnote 13. continued next page)

1 3.2 The Underlying Basis for the Government's Request for
2 a Stay is Without Merit, and the District Court
3 Properly Exercised Its Discretion to Deny the Stay.
4

5 Since the Government's motion for a stay pending its
6 completion of the review of the FBI files relating to Mrs. Exner
7 was subject to the Court's discretion, the Court could properly
8 consider the underlying basis for the Government's request. Not
9 only did the Government fail to demonstrate the existence either
10 of "exceptional circumstances" or of the exercise of "due dili-
11 gence", but also the Government was unable to establish any
12 independent, meritorious reason why the stay should be granted.
13 The Government's principal contention in support of the stay was
14 that Mrs. Exner's request did not deserve any preferential
15 treatment. The Government argued that Mrs. Exner should be made
16 to wait in line with all other requestors, even though she had
17 exercised her right, under both the Freedom of Information Act
18 and the Privacy Act, to expedite her request by commencing
19 litigation in the District Court. ^{14/}
20

21 (Footnote 13 continued)

22 could grant a temporary stay. In the instant situation,
23 the Government not only has failed to begin its review,
24 but also it has not even determined the scope of the
25 records relating to Mrs. Exner. Thus, there has been
no due diligence exercised, and no exceptional circum-
stances pled.

26 ^{14/} 5 U.S.C. §552(a)(4)(B) and (a)(6)(C); 5 U.S.C. §552a(g)
(1)(D).

27 / / / /

/ / / /

28 / / / /

/ / / /

1 The Government further contends that it should be
2 allowed to consider all requests for information on a "first-
3 come, first-served basis." 15/ Respondents submit that not on
4 is the Government's position untenable and in direct contra-
5 diction to the provisions of the Freedom of Information and
6 Privacy Acts, but also that it is factually inaccurate, as
7 demonstrated by the Government's own admissions.

8 It is obvious that the Government does not treat all
9 Freedom of Information and Privacy Act requests on a first-com
10 first-served basis. In the affidavit of Quinlan J. Shea, Jr.,
11 Chief of the Freedom of Information and Privacy Unit, Office
12 of the Deputy Attorney General, United States Department of
13 Justice, Shea notes that: 16/

14 "Save in those relatively rare instances where
15 an appellant can demonstrate a real and substantial
16 need for preferential handling, I adhere to this
17 practice [processing requests in their approximate
18 order of receipt] as an almost absolute rule."

19 [Emphasis added]

20 Shea's affidavit demonstrates that the Government does not alw
21 treat all requests on a "first-come, first served basis", but
22

23 15/ At page 8 of the Government's Memorandum in Support of
24 Government's Motion for a Stay Pending Appeal, filed
25 with this Court, the Government asks that this Court
26 determine that the handling of Mrs. Exner's request on
a "first-come, first-served basis" is inherently fair
and consistent with the Congressional intent behind the
Freedom of Information and Privacy Acts.

27 16/ See page 7, lines 2 to 8, of Shea's affidavit, filed in
28 the District Court on April 12, 1976, in connection with
the Government's Motion to Stay Pending Completion of
Review.

*this will
have to be
explained*

1 does grant preferential treatment to certain types of requests.
2 Shea's affidavit, however, speaks only in terms of requests sent
3 to the Government, and does not deal with litigated Freedom
4 of Information and Privacy Act requests. However, it does
5 appear from the Affidavit of Michael L. Hanigan, Special Agent
6 of the Federal Bureau of Investigation (who was assigned in a
7 supervisory capacity to the Freedom of Information-Privacy Acts
8 section of the FBI), that litigated Freedom of Information Act
9 and Privacy Act requests often receive preferential treatment.
10 In Hanigan's affidavit he notes that there have been several
11 situations where District Courts have ordered records to be
12 reviewed on a priority basis. ^{17/} Apparently, the Government
13 takes the position that it can, in its own discretion, determine
14 which requests deserve preferential treatment and which do not
15 deserve such treatment, and which court orders it will comply
16 with, and which court orders it will ignore.

17 The fact that the FBI will consider handling a Freedom
18 of Information Act or Privacy Act request in an expedited manner
19 can be demonstrated by reference to Exhibit "4" to the Amended
20 Complaint in this action. Exhibit "4" is a copy of a letter
21 from Quinlan Shea to Mrs. Exner's attorney. In that letter,
22 Shea indicates that he has determined that there is no basis
23 for handling Mrs. Exner's request in an expedited manner. How
24 ever, Shea does indicate that he will pass the request on to
25

26 ^{17/} Hanigan affidavit at page 5, line 16, to page 7, line 29;
27 See footnote 10, infra.

28 / / / /

/ / / /

1 Clarence M. Kelley, Director of the FBI, for his consideration

2 Although the Government did not feel it was necessary
3 to give priority handling to Mrs. Exner's request, District
4 Judge Schwartz found, on the record before him, that such priority
5 handling was warranted for several reasons. At the April 20,
6 1976, hearing at which the Court denied the Government's motion
7 for a stay pending appeal pursuant to Rule 62(c) of the Federal
8 Rules of Civil Procedure, Judge Schwartz reviewed the history of
9 this litigation. After summarizing the proceedings, Judge
10 Schwartz noted some of the reasons contained in the record why
11 Mrs. Exner's claim should be given such priority handling:

12 "The third question that has to be answered is
13 will the stay substantially harm other parties? Now,
14 it appears to me that by the time any appeal in this
15 matter is decided, a number of months would pass, and
16 Mrs. Exner's interest, as she has stated, in correcting
17 any false press stories or false facts that have
18 been leaked or made public might be past remedy."

19 "Now, I think I should say that I have no particular
20 concern with Mrs. Exner as a person or what
21

22 18/ Shea's letter notes, in pertinent part:

23 "This is in response to your letter of
24 January 26, 1976, in which you set forth a
25 list of reasons why you believe that the pending
26 request and appeal of your client, Judith
27 Campbell Exner, should be given priority of
28 handling over the several thousand previous
requests still pending in the F.B.I.

"I am sending a copy of your letter and
my reply to Director Kelley for his consideration.
In my personal view, however, the case
for preferential treatment is unpersuasive."

1 her motives may be. Evidently, it is alleged that
2 she is going to write a book or is in the course of
3 writing a book. 19/ She may have other motives.
4 She has alleged that there is some fear of danger
5 to her life because of the statements that have been
6 leaked in the press coverage of possible underworld
7 connections.

8 "She's also stated that she would like to know
9 what's in the file so that she can set the record
10 straight, so to speak, if the file contains erroneous
11 information. Again, I think that the Court should
12 take into consideration the fact that, for whatever
13 reason or whatever motives, Mrs. Exner kept the
14 information that is now the hub of this controversy
15 to herself for a period of perhaps 15 or 16 years,
16 that she didn't write any books, she didn't publish
17 any of this information, and then she was subpoenaed
18 before a Senate Committee and required to testify.

19 "I'm sure she was informed that the proceedings
20 were secret, and then she found that the proceedings,
21 at least insofar as they pertained to her, had been
22 leaked obviously--and I can't imagine any other way
23 than through some Government source.

24
25 19/ Prior to the April 20, 1976, Court appearance, counsel for
26 Mrs. Exner advised the Court that Mrs. Exner was not seek-
27 ing the FBI materials for use in her book. Although
28 information in the FBI records may corroborate information
in the book, it appears a certainty that the book will be
completed prior to the time Mrs. Exner would have the FBI
records available to her.

1 "Then, when the stories began to hit the press
2 and Mrs. Exner was made the subject of a great deal
3 of notoriety and publicity, she then brought this
4 action to see if she could have a look at the infor-
5 mation and materials that are filed.

6 "Now, I don't think that her application is a
7 frivolous one, whatever her motives. The articles
8 from the New York Times that have been submitted by
9 her counsel today, indicate that this matter is not
10 a dead issue, but that she is still the subject of
11 very extensive notoriety and statements of specific
12 facts, the immediate source of which is not apparent.

13 * * *

14 "I think that the stay that's being requested
15 here is one that would prevent Mrs. Exner from having
16 the information that is specifically contemplated
17 under the Freedom of Information Act.

18 "Now, the observation is made, or has been made,
19 and was made very strongly at the last hearing on
20 April 12 that there are thousands of requests for
21 information, that Mrs. Exner should just wait in
22 line. I would hazard to guess that many, many of
23 those thousands of requests may be trivial, may
24 be curiosity [sic] seekers, may be persons who
25 want information for various reasons. I think
26 with regard to Mrs. Exner, she is a person who is
27 herself directly concerned, and I don't think that
28 under the circumstances she should just have to wait
in line.

1 "The Government observes that with regard to any
2 possible death threats against her or threats of harm,
3 that there is no evidence of that. Well, threats of
4 that kind frequently, or at least sometimes, do not
5 manifest themselves until some harm occurs. Whether
6 her fears are genuine or just imaginary, I think she
7 should be at least given the opportunity to see the
8 non-exempt materials in her file so that she can
9 perhaps be on her guard against harm, or perhaps
10 these materials would set at rest her possible fears." 20

11
12 The fact that many of the Freedom of Information Act
13 and Privacy Act requests (which the Government wishes to review
14 before dealing with Mrs. Exner's request) are frivolous was
15 acknowledged by the Government. In Quinlan J. Shea's letter to
16 Mrs. Exner's counsel [Exhibit "4" to the Amended Complaint], S
17 admits "that many requests to the F.B.I. have been of a frivo-
18 lous nature. . . ." It is for this reason, among others, that
19 Congress has provided a person requesting a review of his file
20 under the Freedom of Information Act or Privacy Act an oppor-
21 tunity to expedite that review by commencing litigation in the
22 District Court. The Congressional intent to expedite actions
23 brought pursuant to the Freedom of Information Act can be clea-
24 sen from the language of the Act itself. 5 U.S.C. §552(a)(4)
25 provides:

26
27 20/ Reporter's Transcript of Proceedings, April 20, 1976, at
28 page 16, line 19, to page 20, line 11.

1 "Except as to cases the court considers of
2 greater importance, proceedings before the dis-
3 trict court, as authorized by this subsection,
4 and appeals therefrom, take precedence on the
5 docket over all cases and shall be assigned for
6 hearing and trial or for argument at the earliest
7 practicable date and expedited in every way."

8 Section 552(a)(4)(C) also demonstrates the Congressional intent
9 to expedite Freedom of Information Act litigation by requiring
10 the Government to answer a complaint under the Act "within 30
11 days after service" instead of the normal 60 days required by
12 the Federal Rules. The Congressional intent behind the Freedom
13 of Information Act and the Privacy Act could be circumvented if
14 the Government were allowed to make its own determination when
15 process Freedom of Information Act and Privacy Act requests.
16 Under the statutory scheme established by Congress, individuals
17 are given the option to "wait their turn in line" and allow the
18 Government to process their request as soon as it is able to do
19 so, or the individual can expedite the procedure by filing an
20 action in the District Court after the statutory time for the
21 review of his file has passed, and thus expedite the review.

22 Obviously, unless there is some reason for expediting, an
23 individual normally will not file such an action in the District
24 Court. In the instant situation, Mrs. Exner has determined
25 that there is reason to seek her records in an expedited fashion
26 and the District Court, having full knowledge of the facts of
27 this matter, has agreed. The basis for the Government's request
28 stay order is without merit and the District Court did not abuse

1 its discretion in denying the stay
2

3 3.3) The Order from Which the Government is Appealing is
4 not an Appealable Order. The Appeal should be Dis-
5 missed and the Action Allowed to Proceed in the
6 District Court.

7 Upon the filing of its notice of appeal, the Governme
8 sought, and received, a temporary stay of the District Court's
9 orders of April 9 and April 20, 1976. The basis of the Govern-
10 ment's request for the temporary stay was contained in the
11 affidavit of Eloise E. Davies, an attorney in the Appellate
12 Section of the Civil Division of the Department of Justice.
13 Ms. Davies' affidavit was attached to the Government's Motion
14 for Expedited Consideration of Government Appellants' Motion fo
15 Immediate Temporary Stay, filed with this Court. In her affi-
16 davit, Ms. Davies states:

17 "If this Court does not immediately stay the
18 district court's order pending appellate review,
19 the issue raised on this appeal will be rendered
20 moot because if the FBI delivers the documents in
21 question, the plaintiff will have obtained sub-
22 stantially all of the relief sought in her FOIA
23 suit." [Emphasis added]

24 Ms. Davies' contention is totally unfounded. The April 9, 1976
25 Order issued by District Judge Schwartz, which Order the Govern-
26 ment is seeking to stay, is only an interim discovery order and
27 does not resolve any of the issues framed by Mrs. Exner's Amended
28 Complaint.

1 Although the Government is appealing from the April 2
2 1976, Order in which the District Court denied the Government's
3 request for a stay pursuant to 5 U.S.C. §552(a)(6)(C), it is
4 important that this Court understand the provisions of the
5 April 9, 1976, Order which the Government was seeking to stay.
6 The April 9, 1976, Order, in addition to requiring the Govern-
7 ment to file an answer to the amended complaint, also required
8 the Government to submit an affidavit or affidavits identifying
9 the nature of the records maintained by the FBI relating to
10 Mrs. Exner to which the FBI is claiming an exemption either under
11 the Freedom of Information Act or under the Privacy Act. The
12 Government, pursuant to the April 9, 1976, Order was not required
13 to turn over any documents to Mrs. Exner to which an exemption
14 was claimed. The only documents which Mrs. Exner was to receive
15 pursuant to the April 9, 1976, Order were documents to which
16 no exemption was claimed. 21/

17 The fact that the Government might have to turn over
18 to Mrs. Exner some non-exempt documents pursuant to the April 9,
19 1976, Order does not mean that Mrs. Exner is obtaining any of
20 the relief sought in her Amended Complaint. The Government is
21 obligated, both under the Freedom of Information Act and the
22 Privacy Act to turn over all non-exempt documents to a person
23 requesting those documents. 22/ The legislative history both of

24
25 21/ The entirety of the April 9, 1976, Order is set out in the
26 Clerk's Transcript at pages 1 to 4. A portion of the Order
is quoted at pages 3 to 4, infra.

27 22/ 5 U.S.C. §552(a)(6)(C) provides, in pertinent part, that:

28 (Footnote 22 continued next page)

1 the Freedom of Information Act and the Privacy Act make it clear
2 that the purpose of these acts was to facilitate disclosure of
3 person's record to that person (in the case of the Privacy Act)
4 or to any other interested party (in the case of the Freedom of
5 Information Act) where the records are not subject to an exemp-
6 tion set forth in one of the Acts. In the Congressional findi-
7 ng and statement of purpose relating to the Privacy Act, it was
8 noted:

9 "The purpose of this Act is to provide certain
10 safeguards for an individual against an invasion of
11 personal privacy by requiring federal agencies,
12 except as otherwise provided by law, to--

13 "1. Permit an individual to determine what
14 records pertaining to him are collected, maintained,
15 used, or disseminated by such agencies;

16 "* * *

17
18 (Footnote 22 continued)

19 "Upon any determination by an agency to
20 comply with the request for records, the records
21 shall be made promptly available to such person
22 making such request."

23 5 U.S.C. §552(a)(3) also provides that:

24 ". . . Each agency, upon any request for
25 records which (A) reasonably describes such
26 records and (B) is made in accordance with
27 published rules stating the time, place, fees
28 (if any), and procedures to be followed, shall
make the records promptly available to any
person."

The Privacy Act contains a similar provision requiring the
documents be turned over to a person if such documents are
not exempted by any provision of the Privacy Act. 5 U.S.C.
§552a(D)(1).

1 "3. Permit an individual to gain access to
2 information pertaining to him in Federal agency
3 records, to have a copy made of all or any portion
4 thereof, and to correct or amend such records."

5 The primary purpose for litigating a Freedom of Infor-
6 mation Act or Privacy Act request is (in addition to expediting
7 such requests) to contest the validity of any exemptions claimed
8 by the Government. 23/

9 Under the April 9, 1976, Order, the Government has not
10 been required to turn over any documents to which a claim of
11 exemption is being made. The Order merely provides for an
12 itemization of documents to which the Government is claiming a
13 exemption, an identification of the exemption, and sufficient
14 detail about the documents so a court can determine whether an
15 in camera review is necessary. Such an order is merely a pre-
16 liminary order in order to facilitate the handling of Freedom
17 of Information Act and Privacy Act litigation.

18 The April 9, 1976, Order makes specific reference to
19 Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir., 1973), cert. den. 41
20 U.S. 977 (1974). In the Vaughn case, the District of Columbia
21 Circuit was asked to review a District Court order denying the
22 disclosure of records to an individual. In reversing the
23 District Court's order and remanding it for further proceedings
24 the District of Columbia Circuit noted the inherent difficulties
25

26 23/ Additionally, under the Privacy Act, litigation may be
27 commenced in order to have the Government correct an
28 error in a record, or to keep certain records private.
Mrs. Exner is seeking both types of additional relief
in her Amended Complaint.

1 in the handling of Freedom of Information Act matters:.

2 "The Freedom of Information Act was conceived in
3 an effort to permit access by the citizenry to most
4 forms of Government records. In essence, the Act
5 provides that all documents are available to the
6 public unless specifically exempted by the Act itself.
7 This Court has repeatedly stated that these exemptions
8 from disclosure must be construed narrowly, in such a
9 way as to provide the maximum access consonant with the
10 overall purpose of the Act. By like token and specific
11 provision of the Act, when the Government declines to
12 disclose a document the burden is upon the agency to
13 prove de novo in trial court that the information sought
14 fits under one of the exemptions to the FOIA. Thus the
15 statute and the judicial interpretations recognize and
16 place great emphasis upon the importance of disclosure.

17 "In light of this overwhelming emphasis upon dis-
18 closure, it is anomalous but obviously inevitable that
19 the party with the greatest interest in obtaining dis-
20 closure is at a loss to argue with desirable legal
21 precision for the revelation of the concealed informa-
22 tion. Obviously, the party seeking disclosure cannot
23 know the precise contents of the documents sought;
24 secret information is, by definition, unknown to the
25 party seeking disclosure. In many, if not most,
26 disputes under the FOIA, resolution centers around
27 the factual nature, the statutory category, of the
28 information sought.

1 "In a very real sense, only one side to the
2 controversy (the side opposing disclosure) is in
3 a position confidently to make statements cate-
4 gorizing information, . . ." (484 F.2d at 823)

5 In order to allow the party seeking disclosure to present his
6 case for disclosure, the court in Vaughn suggested the following
7 manner in which the trial court could proceed with the litigation
8 upon remand:

9 "The problem of assuring that allegations of
10 exempt status are adequately justified is the most
11 obvious and the most easily remedied flaw in current
12 procedures. It may be corrected by assuring Govern-
13 ment agencies that courts will simply no longer accept
14 conclusory and generalized allegations of exemptions,
15 such as the trial court was treated to in this case,
16 but will require a relatively detailed analysis in
17 manageable segments. An analysis sufficiently detailed
18 would not have to contain factual descriptions that if
19 made public would compromise the secret nature of the
20 information, but could ordinarily be composed without
21 excessive reference to the actual language of the
22 document.

23 "* * *

24 "A need for adequate specificity is closely related
25 to assuring a proper justification by the Governmental
26 agency. In a large document it is vital that the agency
27 specify in detail which portions of the document are dis-
28 closable and which are allegedly exempt. This could be

1 achieved by formulating a system of itemizing and
2 indexing that would correlate statements made in
3 the Government's refusal justification with the
4 actual portions of the document.

5 "Such an indexing system would subdivide the
6 document under consideration into manageable parts
7 cross-referenced to the relevant portion of the
8 Government's justification." (484 F.2d at 826-287)

9 By requiring such detailed affidavits, the Appellate Court in
10 Vaughn was attempting to formulate a procedure which would
11 (1) assure that a party's right to information was not submerged
12 beneath governmental obfuscation and mischaracterization, and
13 (2) permit the court system effectively and efficiently to
14 evaluate the factual nature of the disputed information (484
15 F.2d at 826).

16 District Judge Schwartz determined that the procedure
17 suggested by the Appellate Court in Vaughn presented the most
18 efficient method of proceeding. The order signed by Judge
19 Schwartz mirrors the language in Vaughn. Contrary to the Government's
20 statement that the April 9, 1976, Order grants to Mrs.
21 Exner "substantially all of the relief sought in her FOIA suit
22 the Order merely sets up a preliminary method to proceed with
23 the litigation.

24 The Government is, in essence, contending that Judge
25 Schwartz' Order is similar to the Order that was discussed in
26 Theriault v. United States, 503 F.2d 390 (9th Cir., 1974).
27 However, in Theriault, the District Court granted an order in
28 Freedom of Information Act case pursuant to Rule 34 of the

1 Federal Rules of Civil Procedure. That order required the
2 Government to produce all of the disputed documents and turn
3 them over to the plaintiff. Correctly noting that the effect
4 the District Court's order was to terminate the Freedom of
5 Information Act litigation, this Court vacated the District
6 Court's order and remanded the case to the District Court for
7 further proceedings in order to adjudicate the Government's
8 claims of exemption.

9 The District Court's Order in the instant action is
10 conformity with this Court's ruling in Theriault, since it pro
11 vides a method by which the Government's claimed exemptions ca
12 be expeditiously litigated. Such expeditious handling of
13 Freedom of Information and Privacy Act cases is required by th
14 Freedom of Information Act, 5 U.S.C. §552(a)(4)(D).

15 Based on a review of the April 9, 1976, Order, it is
16 clear that the Order is merely an interim order and not a fina
17 order. The Order does not (as the Government would lead this
18 Court to believe) fully adjudicate Mrs. Exner's Freedom of
19 Information Act and Privacy Act complaint. Interim orders, su
20 as the April 9, 1976, Order, are non-appealable.

21 Normally, an order compelling testimony or production
22 of documents in an ordinary civil suit or criminal action is
23 neither a final order nor an interlocutory order granting an
24 injunction and is not appealable. Alexander v. U. S., 201 U.S.
25 117, 121, 26 S.Ct. 356 (1905); Lampman v. United States Distri
26 Court, Central District of California, 418 F.2d 215 (9th Cir.,
27 1969), cert. den. 397 U.S. 923 (1970); Theriault v. United
28 States, supra; Borden v. Sylk, 410 F.2d 843, (3d Cir., 1969).

1 In certain proceedings, however, where the entire
2 purpose is the discovery of information, such proceedings are
3 regarded as independent actions, with the result that orders
4 that finally compel or refuse to compel testimony or production
5 of documents are appealable as final orders. Theriault v.
6 United States, supra; 9 Moore, Federal Practice, §110.13[2] at
7 page 157 (2d Ed., 1975). However, an appeal can only be had
8 from such orders when they are final and not interim orders.
9 Goldfine v. Pastore, 261 F.2d 519 (1st Cir., 1958). Goldfine
10 involved a proceeding by the Internal Revenue Service to enforce
11 a summons. The taxpayer appealed from an "interim order" of
12 the District Court. The order was termed an "interim" order
13 because it only required the taxpayer to turn over documents
14 that were non-questioned; all documents which related to any
15 tax year in which a contention was made by the taxpayer that the
16 statute of limitations would apply or other questioned documents
17 were excluded from the enforcement order of the District Court.
18 The District Court expressly reserved jurisdiction of the proceeding
19 so that the questionable documents could be more fully
20 adjudicated. Based on the facts of the situation, the First
21 Circuit Court of Appeals denied a motion for a stay holding that
22 the District Court's interim order was a type of interlocutory
23 order not appealable to the Appellate Court.

24 The Ninth Circuit ruled on a similar question in
25 Chapman v. Goodman, 219 F.2d 802 (9th Cir., 1955). In Chapman
26 a special agent of the Bureau of Internal Revenue brought a
27 proceeding to compel an attorney to give testimony concerning
28 tax liability of a client and to bring records relating to

1 financial transactions between the attorney and client. The
2 attorney appeared pursuant to the subpoena, but brought no
3 papers and refused to be sworn. The IRS agent filed an action
4 in the United States District Court seeking an order compelling
5 the attorney to attend and give testimony and to produce books
6 and records. The District Court issued an order directing the
7 attorney to appear and "to bring" all records relating to the
8 financial transactions in question. The Appellate Court ruled
9 that the District Court's order simply required the attorney
10 "to bring" the documents into the presence of the IRS agent,
11 and if any issues of privilege as to testimony or documents
12 arose, then those issues could be brought back before the trial
13 judge who could rule on them. Based on this interpretation of
14 the order, the Court of Appeals ruled:

15 "Taking this view of the order, it would seem
16 that the District Court really has not made a final
17 order, . . ." (219 F.2d at 806)

18 The Ninth Circuit continued:

19 "In the instant case, while attorney Chapman
20 has been ordered to appear before Goodman (and if
21 that were all, the order might be considered final)
22 it does not look as though the court below by its
23 order has come to final grips with the ultimate
24 issue, and that time will arrive when it defines
25 by appropriate order what questions Chapman must
26 answer and what if any documents must be produced."
27 (219 F.2d at 806)

28 / / / /

/ / / /

1 Based on this interpretation of the Order, the Ninth Circuit
2 Court of Appeals dismissed the appeal.

3 It is conceivable that pursuant to the District Court
4 Order of April 9, 1976, the Government will turn over no docu-
5 ments to Mrs. Exner, and that it will claim that all documents
6 in the FBI files relating to her are covered by some form of
7 exemption. Although Mrs. Exner would probably contest this
8 position, the Government would not have to turn over any docu-
9 ments pending an adjudication of its claimed exemptions. Thus,
10 the April 9, 1976, Order of the District Court is an interim
11 order which only allows this litigation to proceed expeditiously
12 as provided for in the Freedom of Information Act. The Order
13 is not appealable, and a stay is not warranted. 24/

14
15 4. CONCLUSION.

16 For the reasons stated herein, the Government's motion
17 for the issuance of the stay should be denied, and the temporary
18 stay issued by this Court should be vacated. The Government's
19

20 24/ It is interesting to note that the Government is seeking
21 a stay pursuant to a provision in the Freedom of Informa-
22 tion Act. There is no similar provision in the Privacy
23 Act, and since Mrs. Exner's Amended Complaint seeks
relief both under the Privacy Act and under the Freedom
of Information Act, there is no basis upon which the
District Court can stay the Privacy Act litigation.

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1 appeal should be dismissed, and the action allowed to proceed
2 in the District Court.

3 DATED: April 30, 1976.

4
5 
6 RICHARD C. LEONARD
7 Attorney for Plaintiff-
8 Appellee, Judith Katherine E.
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CALIFORNIA: D. C.

Dockets

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EMIL E. MELFI, JR.
CLERK, U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JUDITH KATHERINE EXNER,
Appellee,

v.

FEDERAL BUREAU OF INVESTIGATION,
et al.,
Appellants.

FEDERAL GOVERNMENT

No. 76-1903

ORDER

Before: BARNES and GOODWIN, Circuit Judges, and
TAKASUGI, District Judge.*

Each side requests this Court to award costs and/or
attorneys' fees to them as the prevailing party. After
careful consideration, we hold no party has as yet prevailed.

We decline to award costs or fees to either side.
Costs are to abide the final determination of the case in the
district court.

*

The Honorable Robert M. Takasugi, District Judge, Central
District of California, sitting by designation.

Mosefella, 3646

DEPT. COUNSEL

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Nov 30 9 44 AM 1976
LEGAL COUNSEL

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DEC 6 4 47 PM 1976
LEGAL COUNSEL

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JUN 5 1980 CLS

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UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

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145-12-2683

25 APR 1980

MEMORANDUM FOR THE SOLICITOR GENERAL

Re: Judith Katherine Exner v. Federal
Bureau of Investigation
(C. A. 9, No. 78-1880)

TIME LIMITS

Our petition for a writ of certiorari is due on May 5, 1980. We have attached a draft motion for an extension of time.

RECOMMENDATIONS

The FBI recommends certiorari. 1/

The Office of Information Law and Policy recommends against certiorari.

I recommend against certiorari.

QUESTIONS PRESENTED

1. Whether a plaintiff who obtains expedited handling of her FOIA request by order of the District Court has "substantially prevailed" within the meaning of 5 U.S.C. §552(a)(4)(E) so as to be entitled to an award of attorneys' fees and costs against the United States.

2. Whether the Court of Appeals erred in holding that the District Court did not abuse its discretion in awarding attorneys' fees against the United States.

1/ The FBI initially recommended filing a petition for rehearing and a suggestion for rehearing en banc. During a telephone conversation with Ms. Linda Cole of the Civil Division, Special Agent [] agreed that the Ninth Circuit was unlikely to grant rehearing en banc and that the filing of a petition for rehearing would simply give the panel an opportunity to amplify its views. The FBI therefore withdrew its recommendation in favor of rehearing but adhered to its recommendation in favor of certiorari.

60 MAY 28 1980

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STATUTE INVOLVED

5 U.S.C. §552(a)(4)(E) provides:

The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

STATEMENT

On December 24, 1975, Judith Exner submitted a Freedom of Information Act request to the Federal Bureau of Investigation seeking "access to any and all records filed under any of my names." (R. 473). On January 11, 1976, exactly ten working days later, she informed the Deputy Attorney General that the FBI had not responded to her request, that she deemed it to have been denied, and that her letter constituted an appeal requiring disposition within twenty working days. (R. 474). Exner relied upon 5 U.S.C. §552(a)(6)(A) and (C).

On January 15, 1976, the FBI acknowledged Exner's request and explained that it could not fairly act upon her application until it had processed earlier requests from other people. Exner promptly sought priority treatment, averring that she feared for her safety and that her records were of historical interest. (R. 475). On February 5, 1976, the Deputy Attorney General refused to prefer her over the thousands of prior applicants and, on February 6, 1976, Exner sued to compel immediate disclosure. Exner based her lawsuit on the Privacy Act as well as on the Freedom of Information Act.

In District Court, the government argued that FOIA requests had flooded the FBI, rendering it impossible for the agency to process them all within the time limits specified in 5 U.S.C. §552(a)(6)(A) and (C). Under the circumstances, the government contented that the fair and reasonable thing to do was to process each request in chronological order. Nevertheless, the District Court ordered prompt production of all non-exempt material. When both the District Court and the Court of Appeals denied the government's motion for a stay pending appeal, the FBI began processing Exner's request out of sequence.

On appeal, the Ninth Circuit ruled as follows:

We hold the 'first in-first out' consideration of demands, based on date of filing with the FBI, ordinarily seems reasonable, and we hold that the filing of suit by a person demanding information can (but does not necessarily) move such petitioner 'up the line,' i.e. create a preference, particularly if a Federal Court orders it.

* * * * *

We therefore vacate the order of the district court appealed from herein, and remand the case for a determination whether this appellant-defendant is entitled to any relief under 5 U.S.C. §552(a)(6)(C)

The Court of Appeals also declined to award costs or fees to either side, expressly holding that "no party has as yet prevailed." Order dated November 15, 1976.

On remand, the government moved for summary judgment, arguing that the only documents which had not been disclosed were exempt. After reviewing all of the disputed documents in camera, the District Court found that

Defendants have made the maximum reasonable disclosures to plaintiff of the documents in question, and plaintiff has received the documents and portions of documents to which she is reasonably entitled under the Privacy Act and the Freedom of Information Act. Id.

Subsequently, Exner moved the District Court for an award of attorneys' fees and costs which, under 5 U.S.C. §552(a)(4)(E), "may" be taxed against the United States "in any case under this section in which the complainant has substantially prevailed." The Court concluded that Exner had so prevailed because she had succeeded in forcing the government to expedite her request. The Court likened Exner to a "private attorney general," establishing the important legal principle of "priority" in unusual situations. Opinion dated January 27, 1978. The amount assessed against the United States was \$10,075.21.

Exner appealed on the disclosure issue and you authorized us to file a cross-appeal on the attorneys' fee issue. We argued that an FOIA litigant cannot "substantially prevail" within the meaning of 5 U.S.C. §552a(4)(E) unless s(he) obtains some sort of disclosure which the government would not otherwise have made. Expedition alone would not suffice. We also

argued that Exner did not prevail on the merits of her expedition claim: she had obtained preferential treatment only because of the government's failure to obtain a stay pending our successful appeal on that issue. Finally, we argued that the district court had abused its discretion in awarding fees because Exner's lawsuit had produced no public benefit, because she had a commercial motive for filing suit and because the FBI had a solid legal basis for its actions. A copy of our brief is attached.

The Ninth Circuit did not discuss any of these issues. Indeed, it disposed of our appeal with the unelaborated and somewhat inapposite statement that the district court's findings withstood analysis under Rule 52, Fed. R. Civ. P.

DISCUSSION

We share the FBI's irritation over the Ninth Circuit's disposition of this appeal. It is galling to pay attorneys' fees in a case which vindicates the government's behavior on all counts. In connection with the first Exner appeal the Ninth Circuit upheld the FBI's practice of processing requests on a first-in-first-out basis. During the proceedings on remand and on the second appeal both the District Court and the Court of Appeals found that the agency had made the maximum reasonable disclosure. It is difficult to see what else the Bureau could have done to comply with the statute.

Nonetheless, we do not regard this case as an appropriate vehicle for certiorari. The Ninth Circuit's decision has very little adverse precedential significance. Most agencies do not have enormous backlogs of FOIA requests. Moreover, the standards which a litigant must meet in order to obtain expedition are quite stringent. See Exner v. Federal Bureau of Investigation, 542 F.2d 1121 (9th Cir. 1976); Open America v. Watergate Special Prosecution Force, 547 F.2d 605 (D.C. Cir. 1976). As a result, very few FOIA cases involve preferential handling. The FBI has had only three such cases. No other agency has had any.

Moreover, we can probably distinguish the Exner decision from subsequent cases involving expedited handling. The Ninth Circuit affirmed the district court's decision without comment and that decision rests in part upon the fact that Exner's suit proved to be one of the test cases on the question of preferential treatment. The court apparently believed that Exner had served the public interest by acting as the trail-blazer on this issue. Subsequent litigants will not be able to advance this claim.

CONCLUSION

For the foregoing reasons, I recommend against certiorari.

ALICE DANIEL
Assistant Attorney General
Civil Division

By:

Thomas S. Martin
Deputy Assistant Attorney General

memorandum

DATE:
REPLY TO
ATTN OF:

February 11, 1980
 Leonard Schaitman
 Appellate Staff, Civil Division
 Department of Justice
 Exner v. Federal Bureau of Investigation
 (C. A. 9, No. 78-1880,)

LS:LMCole:wm
 145 - 12 - 2683

SUBJECT:

TO:

~~LEONARD KATHARINE~~
 [REDACTED]
 Legal Counsel Division
 Federal Brueau of Investigation

FEDERAL GOVERNMENT

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I am enclosing for your review a recent decision of the United States Court of Appeals for the Ninth Circuit which sets unfavorable precedent under the attorney's fees provision of the Freedom of Information Act. We are presently considering whether to file a petition for rehearing and a suggestion for rehearing en banc; we may ultimately have to consider whether to file a petiton for a writ of certiorari. Your comments will help us to ascertain the extent to which the Ninth Circuit's decision adversely affects the government.

Briefly, the district court awarded attorney's fees to the plaintiff even though it had upheld every single one of the government's claimed exemptions. The court theorized that the plaintiff had "substantially prevailed" within the meaning of 5 U.S.C. §552(a)(4)(E) because she had obtained a judicial order directing the F.B.I. to process her request ahead of the prior requests of other individuals. The government appealed, contending, inter alia, that an FOIA litigant cannot substantially prevail within the meaning of the fee provision unless (s)he obtains some sort of disclosure which the government would not otherwise have made. A copy of the government's brief is attached. The Ninth Circuit affirmed the decision of the district court as a factual finding which withstood review under the clearly erroneous standard.

We would appreciate your comments on all aspects of the decision. However, we are particularly interested in your views on (1) the extent to which government agencies find it impossible to comply with the time limits of the FOIA and resort to processing requests on a first-in-first-out basis, (2) the extent to which the courts have been ordering government agencies to process certain FOIA requests ahead of others, and (3) the extent to which such court orders disrupt an agency's ability to process all FOIA requests in the most efficient possible manner.

Please send your comments to Linda M. Cole, Room 3610, Appellate Staff, Civil Division, Department of Justice, Washington, D. C. 20530. You may also telephone Mrs. Cole at 633-3525. Thank you for your cooperation.



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Date 4/25/85

TO: DIRECTOR, FBI
(ATTN : LEGAL COUNSEL DIVISION, SA [REDACTED])

FROM: SAC, SAN FRANCISCO (197-0)

JUDITH KATHERINE EXNER
v. FEDERAL BUREAU OF INVESTIGATION
ET AL
9th CIRCUIT COURT OF APPEALS
CIVIL ACTION NOS. 78-1880;
78-1152

Re LA telcall from PLA [REDACTED] to San Francisco dated 4/17/85.

Enclosed for the Legal Counsel Division and Los Angeles are two copies each of Docket Sheets of captioned matter.

Pursuant to referenced telephone conversation, San Francisco obtained the enclosures from the 9th Circuit Court of Appeals. They are being forwarded for information.

7-50

DE-121

67-1161-39

4-ENCLOSURE

2 - Bureau (Enc. 2)
2 - Los Angeles (Enc. 2) (Attn: PLA [REDACTED])
1 - San Francisco
JDLW/dc
(5)

APR 28 1985

LEGAL COUNSEL

Approved: [Signature]

Transmitted

(Number) (Time)

Per

ENCLOSURE



62-116929-39

appeal filed March 24, 1978

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

78-1880

... FED. REP. 2ND. P . . . ,

FILED IN DC: February 6, 1976

CONSOLIDATED WITH: 78-1152

FPI LC 11-75 10M 9000

CIVIL

DC: SOUTHERN CALIFORNIA

PREV.: 76-1903 (rem., 9/30/76, BA,
G & Takasugi)

JUDITH KATHERINE EXNER,

Plaintiff/Appellee,

VS.

FEDERAL BUREAU OF
INVESTIGATION, et al.,

Defendants/Appellants.

For ~~Appellant~~ Appellee:

Richard C. Leonard, Esq.

For ~~Appellees~~ Appellants:

UNITED STATES ATTORNEY
John R. Neece, AUSA
Chief, Civil Division

[illegible]

78-1880

DATE 1978	FILINGS-PROCEEDINGS	CLERK'S FEES		
		APPELLANT	APPELL	
APR 20	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. - nw	USA		
Apr 23	Filed in 78-1152, as of 4/20, aplt's (Exner) motion for consolidation of appeals 78-1152 and 78-1880 and combined briefing schedule; motion for ext of time to file opening brief; affidavit in support. 4/17 (Schickele) ec			
May 1	Filed, as of Apr. 27, in 78-1152, order (BR) Upon due consideration of aplt's motion, these appeals #'s 78-1152 & 78-1880 are consolidated, aplt in Appeal No. 78-1152 shall be deemed aplt for purposes of briefing pursuant to Rule 28(h), F.R.A.P., and she is granted an ext of time through May 26, 1978 in which to file her brief. -fn-			
	FOR FURTHER PROCEEDINGS SEE 78-1152			
EB 15	As of 2/12/79 ARGUED & SUBMITTED Before: ELY, WALLACE, C.J.J., PREGERSON, D.J.	CALENTARE		
Mar 6	Recvd as of 3/5, in 78-1152, ltr dtd. Feb 28, 1979, from US Dept of Justice, re documents submitted to DC in camera. (panel) ec	FFB 18 1979 X.C.		-v-
Mar 28	Filed in 78-1152, Aplees' motion to recuse. 3/27 (panel) ec			
Apr 3	Filed in 78-1152, as of Apr 2, order (E) granting aplee's motion to recuse. -dmf-			
Apr 3	Recvd in 78-1152, from aple (USA) ltr dtd. Mar 30, 1979, re 1st Cir. decision in <u>Irons v. Bell</u> . (Wl, Pregerson) ec cc. Judge Goodwin (replacing Judge Ely)			
Apr 12	Recvd in 78-1152, from US Dept of Justice ltr dtd. Apr 9, 1979, with copies of the Fourth Cir. opinion in <u>Ryan v. Dept of Justice</u> . (G, Wl, Pregerson) ec			
Apr 26	As of Apr 23, in 78-1152, FILED ORDER (G, WL, PREGERSON) the matter is withdrawn from submission to the former panel of Judges Ely, Wallace and Pregerson, and will be resubmitted to the panel of Judges Goodwin, Wallace and Pregerson 28 days from the date of this order upon the briefs and records now on file and upon the tape-recorded oral argument. -dmf-			
May 14	Recvd in 78-1152, letter dtd. May 10, 1979, from the US Dept of Justice, w/copies of the 1st Cir decision in <u>Irons v. Bell</u> and 4th Cir decision in <u>Ryan v. Dept of Justice</u> , requesting that they be made available to Judge Goodwin. (see entries of 4/3/79 & 4/12/79) to "G" ec			
20	Rec'd in 78-1152 Aples Add'l citations. (panel) -vt-			
	(See Search Sheet)			

DATE 1980		FILINGS-PROCEEDINGS	CLERK'S APPELLANT
Feb 4	ORDERED OPINION (GOODWIN) PREGERSON (CONCURRING) FILED & JUDG TO BE FILED & ENTD:		
Feb 4	Filed opinion - Affirmed JS/34		
Feb 4	Filed & Entered Judgment. -rmc-		
FEB 13	Filed aplts' (FBI, et al) motion for 21 day ext. of time to file petition for rehearing & suggestion for rehearing en banc. (panel) 2/12 -db-		
Feb 20	Filed order (G) GRANTING defts/aplt's motion for an ext of twenty-one (21) days to file a petition for rehearing and suggestion of the appropriateness of rehearing en banc. -rmc-		
11 MAR 1980	MANDATE ISSUED		
	RECORD RET'D Date: JUN 26 1980		
	Pldgs: Vol(s)		
	R/T's: Vol(s) 3 ORIG		
	Exh's: Bx, Eny, () Sealed		
	Ctfd Mail No. 12572-1000		

appeal filed March 24, 1978

78-1880

CONSOLIDATED WITH: 78-1152

FPI LC 11-75 10M 9000

DC: SOUTHERN CALIFORNIA

PREV.: 76-1903 (rem., 9/30/76, BA,
G & Takasugi)

For ~~Appellant~~ Appellee:

Richard C. Leonard, Esq.

JUDITH KATHERINE EXNER,

Plaintiff/Appellee,)

vs.

FEDERAL BUREAU OF
INVESTIGATION, et al.,

For ~~Appellees~~ Appellants:

UNITED STATES ATTORNEY
John R. Neece, AUSA
Chief, Civil Division

Defendants/Appellants.

[illegible]

78-1880

DATE 1978	FILINGS-PROCEEDINGS	CLERK'S FEES		
		APPELLANT	APPELLI	
APR 20	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. -- nw	USA		
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Mar 26	As of Apr 23, in 78-1152, FILED ORDER (G, WL, PREGERSON) the matter is withdrawn from submission to the former panel of Judges Ely, Wallace and Pregerson, and will be resubmitted to the panel of Judges Goodwin, Wallace and Pregerson 28 days from the date of this order upon the briefs and records now on file and upon the tape-recorded oral argument. -dmf-			
Mar 14	Recvd in 78-1152, letter dtd. May 10, 1979, from the US Dept of Justice, w/copies of the 1st Cir decision in <u>Irons v. Bell</u> and 4th Cir decision in <u>Ryan v. Dept of Justice</u> , requesting that they be made available to Judge Goodwin. (see entries of 4/3/79 & 4/12/79) to "G" ec			
20	Rec'd in 78-1152 Aples Add'l citations. (panel) -vt-			
	(See Summary Sheet)			

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78-1152

DATE 1978	FILINGS-PROCEEDINGS	CLERK'S FEES		
		APPELLANT	APPELL	
JAN 23	DOCKET FEE PAID. - nw	\$50.	00	
JAN 25	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. nw			
Feb 9	FILED, AS OF JAN 30, 1978 CERT TRANS RECORD ON APPEAL IN FIVE VOLUMES: VOLS. I-II, PLDGS, THREE CERT COPIES; VOLS. III-V, R/T'S, ORIG & ONE COPY. -dmf-			
Feb 9	Aplt's brief due March 20, 1978. -dmf-			
Mar 14	Filed, as of Mar. 13, motion & order (CLK) Granting aplt an ext if time to and including April 24, 1978 in which to file her opening brief. Subject to reconsideration if any objection filed within 7 days. -fn-			
Apr 21	Filed as of 4/19, aplt's (Exner) motion for consolidation of appeals 78-1152 and 78-1880 and combined briefing schedule; motion for ext of time to file opening brief; affidavit in support. 4/17 (Schickele) ec			
Apr 25	FILED AS OF 4/21/78, CERT SUPPLEMENTAL RECORD ON APPEAL IN ONE VOL. OF PLDGS, VOL. II-A, THREE CERT COPIES. RECORD IN SIX VOLS. -ma-			
May 1	Filed, as of Apr. 27, order (BR) Upon due consideration of aplt's motion, these appeals #'s 78-1152 & 78-1880 are consolidated, aplt in Appeal No. 78-1152 shall be deemed aplt for purposes of briefing pursuant to Rule 28(h), F.R.A.P., and she is granted ext of time through May 26, 1978 in which to file her brief. -fn-			
Jun 5	Filed 26 Aplt's Opening Briefs 5/26 -jrv-			
June 22	Filed motion & order (CLK) Granting aples (FEDERAL BUREAU OF INVESTIGATION, WILLIAM H. WEBSTER, & GRIFFIN B. BELL) an ext of time to and including July 26, 1978 in which to file their brief. -fn-			
AUG 3	Filed, as of 7/31/78, motion & order (Clk) granting defts leave to file their brief one day out of time. nw			
Aug 3	Filed, as of July 31, 25 Aplees' Briefs (FBI, et al) 7/27/78 -dmf-			
UG 15	Filed, as of 8/14/78, motion & order (Chief Deputy Clk) granting pltf-aplt and aple (EXNER) an extension of time to and including September 15, 1978 in which to file her reply brief. nw			
Sept 15	Filed, as of Sept. 14, motion & order (CLK) Granting pltf-aplt and aple (JUDITH EXNER) an ext of time to and including Sept. 29, 1978 in which to file her reply brief. -fn-			
Oct 4	Filed, as of Oct 3, 25 Aplt's Reply Briefs (Exner) 9/29/78 -dmf-			
(SEE SECOND SHEET)				

DATE 1978	FILINGS-PROCEEDINGS	CLERK'S APPELLANT
Oct 17	Filed, as of Oct. 16, motion & order (CLK) Granting aplts F.B.I., et al., an ext of time to and including Oct. 30, 1978 in which to file its brief. -fn-	
Nov 2 1978	Filed, as of Nov 1, 25 Aplee/Cross-Aplts' Reply Briefs (FBI, et al) 10/30/78 -dmf-	
FEB 15	As of 2/12/79 ARGUED & SUBMITTED Before: ELY, WALLACE, CJJ, PREGERSON, DJ	CALENDARED
Mar 6	Recvd as of 3/5, ltr dtd. Feb 28, 1979, from US Dept of Justice, re documents submitted to DC <u>in camera</u> . (panel) ec	FEB 12 1979 L.G.
Mar 28	Filed Aplees' motion to recuse. 3/27 (panel) ec	
Apr 3	Filed, as of Apr 2, order (E) granting aplees' motion to recuse. -dmf-	
Apr 3	Recvd from aple (USA) ltr dtd. Mar 30, 1979, re 1st Cir. decision in Irons v. Bell. (Wl & Pregerson) ec cc. Judge Goodwin (replacing Judge Ely)	
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May 14	Recvd from US Dept of Justice letter dated May 10, 1979, w/copies of the 1st Cir decision in Irons v. Bell and 4th Cir decision in Ryan v. Dept of Justice, requesting that they be made available to Judge Goodwin. (see entries of 4/3/79 & 4/12/79) ec (to "G")	
JUL 20 1980	Rec'd Aplees' Add'l citations. (panel) -vt-	
Feb 4	ORDERED OPINION (GOODWIN) PREGERSON (CONCURRING) FILED & JUDG TO BE FILED & ENTD.	
Feb 4	Filed opinion - Affirmed	
Feb 4	Filed & Entered Judgment. -rmc-	
FEB 13	Filed in 78 1880, aplts' (FBI, et al) motion for 21 day ext. of time to file petition for rehearing & suggestion for rehearing en banc. (panel) 2/12 -db- JS/34	
11 MAR 1980	MANDATE ISSUED	
		RECORD RET'D Date: JUN 26 1980 Pldgs: Vol(s) R/T's: Vol(s) 3 AB 16 Exh's: Bx, Env, () Sealed Offd Mail No. 65612512

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JUL 20	Rec'd Aplees' Add'l citations. (panel) -vt-	
1980 Feb 4	ORDERED OPINION (GOODWIN) PREGERSON (CONCURRING) FILED & JUDG TO BE FILED & ENTD.	
Feb 4	Filed opinion - Affirmed	
Feb 4	Filed & Entered Judgment. -rmc-	
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